Supreme Court, U.S.
FILED
99 218 AUG 3 1999
OFFICE OF THE CLERK

No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

VICKI LOPEZ-LUKIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Carter G. Phillips*
Thomas C. Green
Bradford A. Berenson
Griffith L. Green
Andrew E. Weis
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

*** Counsel of Record**

August 3, 1999

133rd

QUESTIONS PRESENTED

1. Whether, in an "honest services" mail fraud prosecution of a public official under 18 U.S.C. § 1346, the district court must instruct the jury on the meaning of a public official's "honest services" in her "official capacity."

2. Whether a public official's "honest services" under 18 U.S.C. § 1346 include discussions with reporters about the public official's private life, or whether, instead, those services are limited to the public official's votes, decisions, and other official actions on matters involving public business.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the case, Sylvester Lukis, petitioner's husband, was also a defendant at trial. Mr. Lukis was charged in the same indictment as Mrs. Lukis and was acquitted by the jury on all counts.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 14

I. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING THE INTERPRETATION OF, AND JURY INSTRUCTIONS GOVERNING, THE TERMS "HONEST SERVICES" AND "OFFICIAL CAPACITY" 15

II. REVIEW SHOULD BE GRANTED TO DEFINE THE OUTER BOUNDARIES OF THE PUBLIC'S RIGHT TO THE "HONEST SERVICES" OF GOVERNMENT OFFICIALS 22

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Calhoon v. *Harvey*,
379 U.S. 134 (1964) 21

City of Newport v. *Fact Concerts, Inc.*,
453 U.S. 247 (1981) 21

Curtis v. *Loether*,
415 U.S. 189 (1974) 21

Heffron v. *International Soc'y for Krishna Consciousness, Inc.*,
452 U.S. 640 (1981) 21

Massachusetts v. *United States*,
435 U.S. 444 (1978) 21

McNally v. *United States*,
483 U.S. 350 (1987) 1,4,20,21

United States v. *Biaggi*,
909 F.2d 662 (2d Cir. 1990) 17

United States v. *Bloom*,
149 F.3d 649 (7th Cir. 1998) 23

United States v. *Boffa*,
688 F.2d 919 (3d Cir. 1982) 21

United States v. *Bolden*,
No. 97-C-0218 (N.D. Ill. 1999) 18

United States v. *Boots*,
80 F.3d 580 (1st Cir. 1996) 24

United States v. *Brumley*,
116 F.3d 728 (5th Cir.), *cert. denied*,
118 S. Ct. 625 (1997) 23

United States v. *Curry*,
681 F.2d 406 (5th Cir. 1982) 21

United States v. *Czubinski*,
106 F.3d 1069 (1st Cir. 1997) 26

United States v. *Espy*,
No. 97-0335 (RMU) (D.D.C. 1998) 20

United States v. *Grandmaison*,
77 F.3d 555 (1st Cir. 1996) 24

United States v. *Gray*,
790 F.2d 1290 (6th Cir. 1986), *rev'd*,
483 U.S. 350 (1987) 21

United States v. *Isaacs*,
493 F.2d 1124 (7th Cir. 1974) 21

United States v. *Lemire*,
720 F.2d 1327 (D.C. Cir. 1983) 21

United States v. *Lopez-Lukis*,
102 F.3d 1164 (11th Cir. 1997) 4,7

United States v. *Louderman*,
576 F.2d 1383 (9th Cir. 1978) 21

United States v. *Mandel*,
591 F.2d 1347 (4th Cir.),
aff'd en banc in relevant part by an equally divided court,
602 F.2d 653 (4th Cir. 1979) 21,24

United States v. *Margiotta*,
688 F.2d 108 (2d Cir. 1982) 21

United States v. *McNeive*,
536 F.2d 1245 (8th Cir. 1976) 25

United States v. *Paradies*,
98 F.3d 1266 (11th Cir. 1996), *cert. denied*,
118 S. Ct. 598 (1997) 24

United States v. *Rabbitt*,
583 F.2d 1014 (8th Cir. 1978) 25

United States v. *Reece*,
614 F.2d 1259 (10th Cir. 1980) 21

United States v. *Santiago*,
No. 97-CR-441 (N.D. Ill. 1998) 18

United States v. *Sawyer*,
85 F.3d 713 (1st Cir. 1996) ..... *passim*

United States v. *Silvano*,
812 F.2d 754 (1st Cir. 1987) 21

United States v. *States*,
488 F.2d 761 (8th Cir. 1973) 21

United States v. *Waymer*,
55 F.3d 564 (11th Cir. 1995) 24

United States v. *Woodward*,
No. 97-1429 (D. Mass. 1998) 17

United States v. *Woodward*,
149 F.3d 46 (1st Cir. 1998), *cert. denied*,
119 S. Ct. 1026 (1999) 18

FEDERAL STATUTE

18 U.S.C. § 1346 ..... *passim*

LEGISLATIVE HISTORY AND RULE

134 Cong. Rec. S8055 (daily ed. June 17, 1988) 25

Sup. Ct. R. 10(a) 3

SCHOLARLY AUTHORITIES

Geraldine Szott Moohr, *Mail Fraud and the*
Intangible Rights Doctrine: Someone to Watch Over Us,
31 Harv. J. on Legis. 153 (1994) 23

Ellen S. Podgor, *Mail Fraud: Opening Letters*,
43 S.C. L. Rev. 223 (1992) 23

OTHER AUTHORITIES

Federal Criminal Jury Instructions of the Seventh Circuit (1999) 18

First Circuit Pattern Jury Instructions (Criminal Cases) (1998) 17

William C. Smith, *Big Objections to Brief Decisions*, ABA Journal, Aug. 1999 20

PETITION FOR WRIT OF CERTIORARI

Petitioner Vicki Lopez-Lukis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit below.

OPINIONS BELOW

The original one-word order of the court of appeals affirming the conviction (App. 1a-2a) was entered on January 27, 1999 and is not reported. The court of appeals' subsequent opinion and order on rehearing (App. 3a-10a) was entered on May 5, 1999 and is also unreported. The colloquies in mid-April, 1997 in which the district court refused to instruct the jury on the meaning of petitioner's "honest services" in her "official capacity," and the resulting "honest services" fraud instructions issued to the jury (App. 32a-46a) are part of the record below and are not separately reported.

JURISDICTION

The court of appeals entered its judgment on May 5, 1999. App. 3a-10a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute at issue is 18 U.S.C. § 1346. That statute was added to the United States Code in 1988 for the purpose of overruling in part this Court's decision in *McNally* v. *United States*, 483 U.S. 350, 356 (1987), which had held that mail or wire fraud schemes must have as their object the deprivation of money or property. Section 1346 provides in full:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

STATEMENT OF THE CASE

The question presented in this case is whether public officials prosecuted under the mail fraud statute for deprivation of "honest services" are entitled to a jury instruction limiting the scope of criminal liability under that statute to matters involving official conduct and governmental decisionmaking. The decision below, in contrast with decisions of other federal courts of appeals, affirmed a mail fraud conviction of a former state official based upon jury instructions that permitted an "honest services" conviction to rest upon misrepresentations to the media and constituents regarding the official's private life.

The statutory terms "honest services" and "official capacity" demarcate the line between conduct that is merely dishonest and that which constitutes the specialized form of fraud made criminal by 18 U.S.C. § 1346. In affirming petitioner's conviction, the Eleventh Circuit refused to limit convictions under the mail fraud statute to conduct that clearly falls within the plain meaning of the statutory terms. In fact, it was only after well-publicized criticism of the decision below, including a front-page feature story in the *New York Times*, that the court issued any opinion at all, and that opinion still failed adequately to address the statutory interpretation issue at the heart of this case.

The Eleventh Circuit's ruling allowed petitioner to be found guilty of "honest services" mail fraud and imprisoned without any instruction defining "honest services" and based upon the jury's legally erroneous belief that lying to the press about a love affair amounts to a deprivation of a public official's "honest services" within the meaning of 18 U.S.C. § 1346. In so doing, the decision below conflicts with the "honest services" rulings of other courts of appeals, which insist upon detailed instructions on the meaning of these specialized legal terms. The judgment below thus warrants review by this Court because

of this important disparity in the circuits. Indeed, the Eleventh Circuit "so far departed from the accepted and usual course of judicial proceedings, [and] sanctioned such a departure by a lower court, as to call for an exercise this Court's supervisory power." Sup. Ct. R. 10(a).

1. Petitioner Vicki Lopez-Lukis and her husband, Sylvester Lukis, were tried together before a jury on 10 counts of bribery-related charges.[1] Following a two-week trial involving 41 witnesses (including both defendants) and hundreds of exhibits, Mr. and Mrs. Lukis were acquitted of 21 of the 22 counts submitted.[2] The sole exception was the mail fraud charge against petitioner in Count One of the indictment. That charge alleged that she and her husband devised a scheme to defraud the citizens of Lee County, Florida, "of their intangible right to the honest services of [Mrs. Lukis] in her official capacity as Lee County Commissioner." App. 18a.

This count of the indictment was brought under 18 U.S.C. §§ 1341 and 1346. Section 1341 is the general mail fraud statute, which makes criminal any "scheme or artifice to defraud" that involves the use of the mails. Section 1346 is a specialized adjunct to that statute, which expands the schemes eligible for prosecution to include certain schemes that do not have as their object the taking of money or property.

---

[1] Mr. and Mrs. Lukis were indicted on March 10, 1995 in an eleven-count indictment which charged one joint count of "honest services" mail fraud under 18 U.S.C. §§ 1341 and 1346; one count each of bribery under 18 U.S.C. § 666; and eight joint counts of using a facility in interstate commerce to commit bribery in violation of the Travel Act, 18 U.S.C. §§ 2 and 1952. App. 11a-24a.

[2] The district court erroneously submitted eleven counts against each defendant to the jury on the verdict form, presumably because it failed to notice that two of the eleven counts in the indictment (counts 2 and 3) each charged only one of the two defendants.

Cf. *McNally* v. *United States*, 483 U.S. 350, 356 (1987) (holding that § 1341 encompasses only schemes to deprive another of money or property). In prosecutions against public officials, § 1346 operates to criminalize bribery, kickbacks, and other actions that deprive the public of its "intangible right of honest services," 18 U.S.C. § 1346, *i.e.*, its right to have public officials refrain from "undisclosed, biased decisionmaking for personal gain." *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).

2. The "honest services" mail fraud charge against Mr. and Mrs. Lukis in Count One was based on the same essential allegation that underlay each of the other counts of the indictment: bribery. The payments at issue were a series of financial gifts Mr. Lukis made to petitioner during the spring and summer of 1991, at a time when she was a County Commissioner in Lee County, Florida, and he was a lobbyist with two clients who had interests before the Lee County Board of County Commissioners ("BOCC" or "the Board"). As authoritatively construed in a pretrial appeal, the gravamen of the charge in Count One was that Mr. Lukis "paid [petitioner] for political favors," including "her vote on key matters" affecting his clients and "her influence to deliver a majority of the Board's votes on those matters." *United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1168 (11th Cir. 1997).

At the time of Mr. Lukis's gifts to petitioner, they were not married but were involved in an intimate personal relationship with one another, which both of them preferred to keep private. Petitioner was then 33 years old, unmarried, and approximately four months into her first term as a Republican Commissioner on the Lee County Board. Mr. Lukis was a successful Washington-based lobbyist who was married to another woman. With the exception of a few months in the spring and summer of 1992 during which they were estranged, the Lukises remained romantically involved until she resigned

from the BOCC in January 1993. At that time, petitioner moved to Washington, D.C., where she and Mr. Lukis were later married. Their defense at trial was that the gifts in question were made in the course of their romantic relationship and were unrelated to petitioner's duties as a Commissioner.

a. The financial gifts principally at issue in the trial were a series of seven small checks, ranging from $200 to $1,000, and totaling $4,032.[3] The checks were written between May 6, 1991 and August 22, 1991 at irregular intervals and in irregular amounts. They were not written to petitioner; instead, Mr. Lukis made out the checks to a friend of hers, who cashed them and provided the funds to petitioner.

Mr. and Mrs. Lukis never disputed that Mr. Lukis made the payments in question or that they were intended to be, and were, passed along to petitioner. Both defendants explained without contradiction that the payments were reimbursements for bills petitioner incurred in making personal phone calls to Mr. Lukis and other expenses related to their personal relationship, such as a security deposit on an apartment they shared. This testimony was supported by extensive documentation of the associated expenses. Both Mr. and Mrs. Lukis denied that the payments had anything to do with County business or that they were ever intended to influence petitioner's performance of her duties as a County Commissioner. They explained that the payments were made through a third party to help conceal their relationship from Mr. Lukis's then-wife.

b. The prosecution adduced no direct evidence that the payments in question were bribes or were given or received

---

[3] The prosecution also cited Mr. Lukis's payment of some of petitioner's credit card bills and other expenses in the early months of 1993, after she was no longer a County Commissioner and she and Mr. Lukis had established a household together in Washington, D.C., and were engaged to be married.

with any unlawful intent. Not a single witness so testified, and no document cast doubt on the proposition that Mr. and Mrs. Lukis intended these payments to reimburse personal expenses unconnected to any of petitioner's official duties. Instead, the prosecution's case was based entirely on contentions about petitioner's conduct in office, which the prosecution claimed reflected a bias in favor of two of Mr. Lukis's clients: Ogden Projects, Inc. ("Ogden"), a New Jersey-based builder of waste-to-energy trash incinerators, and Goldman Sachs ("Goldman"), a Wall Street investment bank that wished to underwrite municipal bonds in Lee County.

c. With respect to each of Mr. Lukis's clients, the record of petitioner's official actions revealed that she had not consistently favored their interests and that her voting bore little relation to the dates of her romantic relationship with Mr. Lukis or to his gifts to her. She had taken actions that both helped and hurt Mr. Lukis's clients during the period when they were romantically involved, and she had done the same thing during their separation. And while the first telephone bill reimbursement occurred shortly after a vote on the incinerator matter, at other times, petitioner took actions distinctly unfavorable to Mr. Lukis's clients in close temporal proximity to a gift. For example, petitioner voluntarily resigned her position on Lee County's Bond Selection Committee, which was responsible for selecting underwriters of municipal bonds, the very same day she received the proceeds of the $1,000 check (the largest of the group) for the security deposit from Mr. Lukis.

Moreover, the actions she took that were favorable to Ogden and Goldman were all based on sound considerations of public policy that petitioner had articulated before she even met Mr. Lukis. Indeed, with respect to every vote petitioner cast that even arguably benefitted Mr. Lukis's clients, the Board as a whole also voted in favor of Mr. Lukis's clients either

unanimously or by a supermajority. The only time petitioner's vote was decisive, she voted contrary to the interests of Mr. Lukis's client.

d. Although evidence of bribery was scarce, evidence of misrepresentations regarding the relationship between Mr. and Mrs. Lukis was abundant. Throughout the period in question, Mr. and Mrs. Lukis had gone to great lengths to keep their relationship secret. With the exception of their closest friends, Mr. and Mrs. Lukis told no one of their romance. Thus, when asked about the relationship in writing by a reporter for the Fort Myers News-Press, Lee Melsek, in August 1991, petitioner provided a response stating falsely that she had no personal relationship with Mr. Lukis.

In addition, petitioner lied about her involvement in what came to be known as "the videotape incident." This incident involved petitioner's distribution of a videotape made by a private detective that showed Susan Anthony, a married woman running for a seat on the BOCC, cavorting late at night with a lawyer-lobbyist, Bruce Strayhorn, whom petitioner also was dating at the same time. The Eleventh Circuit in a pretrial appeal ruled that this incident was potentially relevant to the bribery allegations in Count One, but only insofar as it might be shown to have been part of an effort to affect the composition of the BOCC in favor of Mr. Lukis's clients by securing the electoral defeat of an anti-incinerator candidate such as Mrs. Anthony. See *Lopez-Lukis*, 102 F.3d at 1170.

The evidence at trial established beyond dispute that the making and release of the videotape had nothing to do with any such effort. Every witness with whom petitioner had contemporaneously discussed this incident confirmed that she acted out of personal animus against Mr. Strayhorn, whom she believed had betrayed her by carrying on an affair with Mrs. Anthony. In her testimony, petitioner admitted her role in the

incident and acknowledged that she had lied about both the incident and her relationship with Mr. Lukis to various friends, acquaintances, business associates, and reporters.

3. Given the evidence, it was critically important for the jury instructions to make clear that the deprivation of "honest services" charged in Count One did not refer to ordinary dishonesty but rather to the special form of dishonest conduct -- accepting money to corrupt judgments and votes about official business -- made criminal by § 1346. Petitioner requested a jury instruction that would have provided this definition, but it was not given.[4] After the district court drafted an instruction that contained no definition of the term "honest services," petitioner proposed a supplemental instruction to cure the defect.[5] She

---

[4] The original proposed instruction read:

> To "defraud the citizens of Lee County of their intangible right to honest services" means that Mr. and Mrs. Lukis must have devised a scheme to influence Mrs. Lukis's performance of her official functions, so that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners. In particular, in order to return a guilty verdict on this count, you must first find that the prosecution has proven beyond a reasonable doubt that Mr. and Mrs. Lukis devised a scheme whereby Mrs. Lukis would solicit, and Mr. Lukis would give, financial payments based on an understanding that Mrs. Lukis's actions as a County Commissioner would be influenced by such payments.

App. 27a.

[5] This instruction read:

> I caution you that it is not sufficient for conviction to conclude that the defendants engaged in a scheme, as I have
>
> (continued...)

argued that such an instruction was needed to explain "what honest services refer to," because "[i]t may not be obvious to the jury that that means bribery." App. 33a; see *id.* ("somewhere we would like your Honor to instruct the jury what a scheme to defraud of honest services means"). At the final charge conference, counsel once again requested "one sentence or two sentences, just making clear that the object of the scheme is the deprivation of honest services, and what that means." *Id.* at 34a. Counsel explained:

> I just want to make absolutely sure that the jury understands that the term, "honest services," refers to the integrity with which she performed her official duties, and not whether she was honest or dishonest in general, because I think it's not disputed that she was dishonest in a number of respects . . . .

---

[5] (...continued)

> just defined it for you. Instead, in order to be found guilty of the honest services mail fraud charged in Count One, Lukis and Lopez-Lukis must have devised a scheme whose object is the same as that alleged in the indictment. The sole object of the scheme charged in Count One is "to defraud the citizens of Lee County of their intangible right to [Lopez-Lukis's] honest services" by making financial payments to her. To "defraud the citizens of Lee County of their intangible right to honest services" means that Lukis and Lopez-Lukis must have devised a scheme to influence Lopez-Lukis's performance of her official duties as Lee County Commissioner through the making of illegitimate payments to her, such that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners.

App. 30a.

Id. at 34a-35a.

The district court again rejected the request. The jury was instructed only that it had to find that Mr. and Mrs. Lukis "knowingly and willfully devised a scheme to defraud the citizens of Lee County of their intangible right to Lopez-Lukis' honest services in her official capacity." App. 45a. No definition of honest services or official capacity was provided.

The dispute between the United States and petitioner over the definition of these statutory terms was carried through in the closing argument. Petitioner argued that a conviction on Count One could rest only upon a finding that she had acted corruptly in voting on or conducting County business. The United States, by contrast, argued that petitioner failed to render "honest services" to the citizens of Lee County by lying to reporter Lee Melsek and others about her relationship with Mr. Lukis and her involvement in the videotape incident: "the honest thing, the proper thing was to disclose the relationship before the first vote, before the first official act . . . . That disclosure, that revealing of the relationship, that would have been honest services." App. 50a.

The closing argument by the United States -- which invited the jury to convict petitioner based upon misrepresentations to constituents and media about her relationship to Mr. Lukis -- was objected to shortly after the jury retired, on the ground that petitioner was:

> fearful that this jury is taking from that rebuttal argument and the fact that the instructions really never defined honest services, a feeling that if they find that she was not candid and honest about the relationship, which she lied about and didn't tell the Lee County voters [about], that that qualifies as a predicate for conviction under Count One.

App. 37a. Petitioner again asked for a short, curative instruction to explain the meaning of "honest services" and eliminate any possibility of confusion. The district court only again denied the request. *Id.* at 42a.

4. The only count on which the jury convicted petitioner was Count One -- the precise outcome that she expressly predicted would occur in light of the misleading argument of the United States and the absence of any instruction on the "honest services" element of the offense. Juror interviews made clear that the absence of the requested instruction caused the conviction:

> "The state did not prove the bribery charges at all," said [juror] Joan Hermanns of Cape Coral. . . . Hermanns said jurors became convinced the money that changed hands between Lopez-Lukis and Lukis were not bribes but gifts related to the couple's romance. . . . Hermanns also said jurors convicted Lopez-Lukis of mail fraud because she lied to a reporter.
>
> "It was the only indictment we had proof of," Hermanns said. "She lied in the questions she filled out for the news reporter."

App. 52a. Another juror, Arthur Hohmann stated that:

> "We couldn't find one iota of proof that a crime was committed. . . . We had one juror that said she must be guilty of something or they wouldn't have gone to all this trouble. This thing would have been hung, so we found she lied to some reporter based on something she mailed."

Id. at 58a. The newspapers also reported that Mr. Hohmann "said there was confusion among the jurors as to the elements of the charge." *Id.* at 56a.

5. Petitioner's principal contention on appeal was that the district court had erred in refusing her repeated requests to instruct the jury on the meaning of "honest services" in her "official capacity." The Eleventh Circuit affirmed by unpublished opinion. That opinion stated in its entirety: "Affirmed." App. 2a.

Petitioner promptly filed a petition for rehearing and suggestion for rehearing *en banc*, reiterating her arguments on the merits and claiming in addition that the panel's terse, unpublished order constituted an abuse of Eleventh Circuit rules governing unpublished opinions. Petitioner argued that "the district court's refusal to provide any definition of the phrases 'honest services' and 'official capacity' left the jury free to convict her for misstatements to the media regarding her personal life and, in particular, her romantic involvement with the man who later became her husband." Appellant's Petition for Reh'g 2. She contended that such misstatements do not constitute a deprivation of "honest services" within the meaning of 18 U.S.C. § 1346, and that a written opinion to the contrary by the panel "would have conflicted with the rulings of other courts of appeal and may have been worthy of certiorari." *Id.* at 3.

The National Association of Criminal Defense Lawyers filed a brief as *amicus curiae* in support of rehearing. And the *New York Times* ran a lengthy, front-page feature article discussing the case and the Eleventh Circuit's leading role in developing a "'two-track [justice] system'" in which many "litigants are quickly losing the right to meaningful appeals." The *Times* article observed that "sketchy rulings may sometimes be used by judges who want to reach a certain legal result but

are not anxious for their decision to be scrutinized." App. 63a, 64a, 68a.

In response, the Eleventh Circuit issued an amended order, which was also unpublished. App. 3a-10a. In this *per curiam* order, the Eleventh Circuit defended the legitimacy of its decision to resolve the appeal without a written opinion and the propriety of its affirmance.[6] In so doing, however, the Eleventh Circuit never addressed whether the jury instructions adequately apprised the jury of the meaning of petitioner's "honest services" in her "official capacity." Instead, the court mischaracterized the issue on appeal, treating the case as a sufficiency-of-the-evidence challenge.

Without ever acknowledging that the jury instructions never defined what petitioner's "honest services" or "official duties" included -- which was the core problem she had repeatedly tried to present to both the district court and the court of appeals -- the court stated that "[t]he jury instructions emphasized that the government must prove that appellant solicited or accepted benefits with the intention of being influenced in her *official* duties," and that "[t]here was ample evidence to support the jury's verdict that defendant accepted benefits to influence her in her *official* actions." App. 6a. The latter points entirely beg the question: even if it were true (and it is not) that the instructions required, and the evidence supported, a finding that petitioner had an intent to be influenced in her official actions, the issue on appeal was whether a guilty verdict could be allowed to stand where the instructions never explained for the jury what "official actions" a public official such as petitioner must dishonestly perform in order to be convicted under 18 U.S.C. § 1346. The critical

---

[6] The Eleventh Circuit explained that "[t]o reasonable lawyers who know the case and who think hard about our decision, the meaning of a Rule 36-1 affirmance is understandable." App. 9a.

question for the jury, which was never answered in the jury instructions, was whether petitioner's "honest services" included only her votes and other decisions affecting County business, as the defense had contended, or whether they also included radio interviews and written press statements, as the prosecution had argued and which had served as the actual basis for conviction. Through judicial sleight of hand, the decision below thus approved the use of jury instructions that left a critical element of the "honest services" fraud offense undefined.

REASONS FOR GRANTING THE PETITION

This case presents unresolved questions of fundamental importance concerning the proper interpretation of the "honest services" mail fraud statute, 18 U.S.C. § 1346, on which the courts of appeals have taken inconsistent positions. In particular, the Eleventh Circuit, contrary to established practice in the First and Seventh Circuits, has affirmed the "honest services" mail fraud conviction below despite the absence of any instruction to the jury on the meaning of the phrases "honest services" and "official capacity." Without such an instruction, the prosecution was allowed to argue in summation, and the jury was left free to accept in its deliberations, that petitioner was guilty of "honest services" fraud based on conduct she had admitted on the stand: lying to the press and the public about a love-affair with her now-husband. Review of this decision is necessary to ensure the legally correct, nationally uniform application of this important public corruption statute, which this Court has not yet addressed.

I. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS REGARDING THE INTERPRETATION OF, AND JURY INSTRUCTIONS GOVERNING, THE TERMS "HONEST SERVICES" AND "OFFICIAL CAPACITY."

1. Through use of its *per curiam* affirmance rule and subsequent mischaracterization of the primary issue on appeal, the Eleventh Circuit avoided issuing a published opinion that on its face would have conflicted with existing decisions in other circuits on a question of extraordinary importance: whether a district court must define for lay jurors the critical phrases "honest services" and "official capacity," which together describe the essence of the conduct made criminal by § 1346. Because numerous circuits -- other than the Eleventh Circuit -- require jury instructions regarding the specialized meaning of a public official's "honest services," there is an important split in circuit law and practice affecting the fundamental rights of persons accused of "honest services" fraud.

Lacking clear guidance from this Court, lower courts have been struggling, in the context of mail fraud prosecutions against public officials, over whether and how to define for the jury the public's right to an official's "honest services." Not surprisingly, many lower courts have provided jury instructions that cannot be reconciled with those the Eleventh Circuit approved below or, for all practical purposes, with each other. Had petitioner stood trial in another circuit, where the right to a jury instruction on the meaning of these legal terms is established, the outcome of this case would have been different.

Here, the district court's instructions -- which were approved silently by the Eleventh Circuit -- contained no definition whatsoever of the phrase "honest services in her

official capacity." The closest the instructions came to apprising the jury of the legal line between "honest services" fraud and generalized dishonesty was a single sentence at the end of the definition of "intent to defraud."[7] That sentence read: "[T]o find that defendant Lopez-Lukis had the required intent to commit honest services fraud, you must find that she solicited or accepted benefits with the intention of being influenced in her official duties." App. 46a. Because the instruction did not define the "official duties" that must be involved in an "honest services" fraud scheme, it allowed the jury to accept the government's erroneous argument that radio interviews and press responses constituted the "official conduct" at issue and thereby convict petitioner of "honest services" fraud for denying her relationship with Mr. Lukis when asked by the media.

In contrast to the absence of instructions upheld by the Eleventh Circuit below, the First and Seventh Circuits have strongly and unequivocally required district courts to inform criminal juries about the precise meaning of "honest services." In *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), the First Circuit reversed a lobbyist's conviction for "honest services" fraud because the instructions failed to instruct the jury properly concerning the difference between "reprehensible misconduct" and "criminal misconduct." *Id.* at 725; *id.* at 741 ("where, as here, the line between the merely unattractive and actually criminal conduct is blurred, the court must take pains to explain the difference to the jury"). The First Circuit mandated that the district courts use a protective instruction in

---

[7] The instructions also contained one sentence in the preamble to the Count One instruction which stated that the alleged scheme involved "influencing Lopez-Lukis' performance of her official duties [through] defendant Lukis' illegitimate payments to her." App. 45a. But this general description of the charge did not illuminate what petitioner's "official duties" included or explain the difference between corrupt official decisionmaking and merely dishonest or disappointing conduct by a public official.

such cases. *Id.* at 742.[8] Thereafter, the First Circuit incorporated this requirement into its pattern jury instruction for mail fraud. See *First Circuit Pattern Jury Instructions (Criminal Cases)*, Inst. 4.12 cmt (3) (1998) ("Schemes to deprive others of the intangible right of honest services are included by virtue of 18 U.S.C. § 1346. For a lengthy discussion of the scope of this phrase, see [*Sawyer*]").

The instructions delivered in the sequel to *Sawyer*, *United States* v. *Woodward*, No. 97-1429 (D. Mass. 1998), underscore the irreconcilable difference between the jury instructions required by the First Circuit and those given in petitioner's trial and upheld by the Eleventh Circuit. In that case, the government accused Francis H. Woodward, a former member of the Massachusetts House of Representatives, of, among other crimes, depriving his constituents of his "honest services" by accepting certain illegal gratuities from William Sawyer, a senior legislative counsel in the government relations department of John Hancock Mutual Life Insurance Company. The district court's instructions, which elaborated on the precise meaning of "honest services" provided, in pertinent part, that:

> Now, there are two sub-elements that the Government must prove when they make the charge that there has been a scheme or artifice to defraud by a deprivation of honest services. . . . First, the Government must show that the public official accepted gratuities -- and

---

[8] As support, the First Circuit cited the Second Circuit, which made the same recommendation in an analogous context: "When an elected official who has received campaign contributions is charged with extortion and with receiving bribes, the charge must carefully focus the jury's attention on the difference between lawful political contributions and unlawful extortionate payments and bribes." *United States* v. *Biaggi*, 909 F.2d 662, 695 (2d Cir. 1991).

> we use "gratuities" generally as things of value that we'll define more specifically as we go along -- knowing that the gratuities were offered to influence or otherwise improperly affect his official action. *The focus here is on the intent of the defendant to accept a gratuity, actually to influence his official duties, to cause him to depart from his duty to act as a disinterested legislator or legislative decision-maker*. . . . The ultimate concern of this sub-element is, I think, clear. *It focuses on whether or not the legislator is exercising his independent judgment in passing on official matters. If the official has been paid by someone or some entity other than the public in connection with his duties, there is a concern that he will make decisions without considering the merits of the matter, regardless of the public interest, and thereby deprive the public of honest and faithful services.*

App. 79a (emphases added). Although the jury convicted Woodward and the First Circuit affirmed, see *United States* v. *Woodward*, 149 F.3d 46, 51 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999), it is indisputable that the instructions mandated by the First Circuit cannot be reconciled with the refusal of the panel below to mandate a definition of "official duties."

The Seventh Circuit also commands the use of such instructions. See *Federal Criminal Jury Instructions of the Seventh Circuit* 261 (1999). Two recent, high-profile "honest services" fraud cases, *United States* v. *Santiago*, No. 97-CR-441 (N.D. Ill. 1998), and *United States* v. *Bolden*, No. 97-C-0218 (N.D. Ill. 1999), illustrate the type of detailed instructions

provided in the Seventh Circuit on "honest services" which repeatedly were requested -- but denied -- in this case.

In *Santiago*, the government indicted Miguel A. Santiago, a member of the Illinois General Assembly, and others for engaging in a ghost pay rolling scheme at the Cook County Treasurer's Office ("CCTO"). Specifically, the indictment alleged that Santiago received approximately $137,000 in wages from the CCTO payroll for clerical work he did not perform. In its instructions, the district court informed the jury that "honest services" fraud does not encompass every form of ethical lapse or dishonest conduct by public officials or employees. Rather, the District Court for the Northern District of Illinois emphasized that Santiago committed "honest services" fraud only if he violated his "fiduciary duty" to Cook County residents to conduct the County's business fairly and unfettered by corruption or fraud. See App. 81a-83a.

In *Bolden*, the government accused John R. Bolden, the Commissioner of the Department of Water for the City of Chicago, of depriving the City and its citizens of his "honest services" by, among other things, accepting bribes in return for assisting a construction company to obtain work from the city. In contrast to petitioner's case, the District Court for the Northern District of Illinois clearly instructed the jurors as to the applicable principles of law, namely, that it could convict him of "honest services" fraud only for political corruption and not for other forms of misbehavior. To convict Bolden for "honest services" fraud, the jury was instructed that it must find he acted "knowingly and with the intent to deprive the City of Chicago and its citizens of their rights to [his] loyal and faithful services in the performance of *acts related to his public employment*, and their rights to have him *make decisions in his official capacity as Water Commissioner* free from corruption,

dishonesty, bribery and fraud." See App. 88a (emphasis added).[9]

2. This conflict in the circuits produces intolerable inconsistency in an area -- federal prosecution of state and local public officials -- in which national uniformity is peculiarly important. Because of the irregular means by which the Eleventh Circuit chose to resolve this case,[10] there is of course no acknowledged conflict between the published reasoning of the Eleventh Circuit and the other courts of appeals. This factor does not counsel against certiorari, however. In addition to the clear conflict in instructional practice among the circuits, the interpretation of federal criminal statutes has often been thought to warrant consideration by this Court, even in the absence of a circuit conflict. Indeed, this Court's seminal decision on "honest services" mail fraud, *McNally* v. *United States*, 483 U.S. 350 (1987), is perhaps the most notable example. Notwithstanding the long-standing, unanimous interpretation by the lower courts of the mail fraud statute, this Court granted certiorari to review the broad application of the intangible rights doctrine to prosecutions of various public officials and private

---

[9] Although there are no District of Columbia Circuit pattern jury instructions, the District Court for the District of Columbia also routinely instructs on the meaning of "honest services." The district court's instructions in *United States* v. *Espy*, No. 97-0335 (RMU) (D.D.C. 1998), also illuminate the disuniformity in lower court practices. *See* App. 90a-97a.

[10] In addition to the *New York Times* article, the Eleventh Circuit's penchant for giving short shrift to certain categories of appeals has prompted recent commentary. *See* William C. Smith, *Big Objections to Brief Decisions*, ABA Journal, Aug. 1999, at 34 (stating that the Eleventh Circuit "leads the circuit courts in issuing decisions that have not included written opinions, with 502 such rulings last year"); app. 69a-75a.

fiduciaries.[11] See *id.* at 379 (Stevens, J., dissenting) (noting the unanimity of the circuits on the precise question considered). It was this decision that prompted passage of § 1346, which this Court has thus far had no opportunity to construe in the eleven years since its passage. In comparison to *McNally*, this case presents a demonstrable conflict and a far more compelling case for certiorari.[12]

---

[11] Prior to this Court's *McNally* decision, *all* of the courts of appeals had recognized the intangible rights theory of the mail fraud statute. *See United States* v. *Silvano*, 812 F.2d 754, 759 (1st Cir. 1987); *United States* v. *Margiotta*, 688 F.2d 108, 121-22 (2d Cir. 1982); *United States* v. *Boffa*, 688 F.2d 919, 926 (3d Cir. 1982); *United States* v. *Mandel*, 591 F.2d 1347, 1358-64 (4th Cir.), *aff'd en banc in relevant part by an equally divided court*, 602 F.2d 653 (4th Cir. 1979); *United States* v. *Curry*, 681 F.2d 406, 411-12 (5th Cir. 1982); *United States* v. *Gray*, 790 F.2d 1290, 1294-96 (6th Cir. 1986), *rev'd*, 483 U.S. 350 (1987); *United States* v. *Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974); *United States* v. *States*, 488 F.2d 761, 765 (8th Cir. 1973); *United States* v. *Louderman*, 576 F.2d 1383, 1387 (9th Cir. 1978); *United States* v. *Reece*, 614 F.2d 1259, 1261-63 (10th Cir. 1980); *United States* v. *Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983).

[12] Even if the instructional conflict were thought to implicate primarily the application of law by the district courts, this Court has in the past granted petitions where there is only a conflict between the decisions of several district courts or the decision of a court of appeals and that of a district court. *See, e.g.*, *Calhoon* v. *Harvey*, 379 U.S. 134, 137 (1964) (granting certiorari because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts"); *Curtis* v. *Loether*, 415 U.S. 189, 191 n.2 (1974) (citing "evenly divided" district court decisions among the reasons for granting certiorari); *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978) (citing conflict between a court of appeals decision and a single district court ruling that a state was constitutionally immune from a federal tax); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 646 & n.9 (1981) (granting petition "in light of the important constitutional issues presented and the conflicting results reached in similar cases in various lower courts," citing *inter alia* four differing federal district court rulings); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 (continued...)

II. REVIEW SHOULD BE GRANTED TO DEFINE THE OUTER BOUNDARIES OF THE PUBLIC'S RIGHT TO THE "HONEST SERVICES" OF GOVERNMENT OFFICIALS.

1. The Eleventh Circuit's decision failed to acknowledge, let alone grapple with, a legal question of extraordinary importance: whether a public official can be convicted of "honest services" mail fraud under § 1346 for lying to the press about her private life -- in this case about an adulterous romance. The worthiness of this issue for review by this Court is made plain by the fact that the summary affirmance of petitioner's conviction could subject virtually every local, state, and federal office holder in the states of the Eleventh Circuit to criminal prosecution for misleading or incomplete statements to the media. This case, in which the issue was clearly preserved and decided and whose facts present the issue in the sharpest imaginable relief, is an excellent vehicle for addressing the outer boundaries of "honest services" fraud liability. This Court -- which has not passed in any depth on § 1346 since its enactment in 1988 -- would advance the law significantly by reviewing this case and deciding whether a politician's misstatement to the press and the public about private behavior is a species of "honest services" mail fraud.

2. "Honest services" mail fraud does not encompass every form of ethical lapse, dishonesty, or even illegal conduct by public officials. See, *e.g.*, *United States* v. *Sawyer*, 85 F.3d 713, 727-30 (1st Cir. 1996) (violations of state gratuity and gift statutes alone do not amount to honest services fraud). Instead,

---

[12] (...continued)
n.14 (1981) (citing only four federal district court decisions in support of the grant of certiorari as to an important and recurring issue of punitive damages under a federal statute).

"although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official for honest services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result." *Id.* at 725. The content of the public's right to "honest services" is not self-defining; decades of judicial interpretation have been required to clarify that only those especially serious forms of misconduct that are calculated to deprive the public of its right to have official decisions made in the public interest amount to schemes to deprive the public of "honest services."[13] Such

---

[13] Courts and commentators alike have frequently noted the difficulty of defining these terms. *See, e.g.*, *United States* v. *Bloom*, 149 F.3d 649, 656 (7th Cir. 1998) ("No one can be sure how far the intangible rights theory of criminal responsibility really extends, because it is a judicial gloss on § 1341. Congress told the courts in § 1346 to go right on glossing . . ."); *United States* v. *Brumley*, 116 F.3d 728, 742 (5th Cir.) (en banc) ("The answers to the questions 'What is an intangible right?', 'What are honest services?', and what is 'the intangible right of honest services' are not clear nor is their meaning readily available to the average citizen.") (Jolly and DeMoss, J.J., dissenting), *cert. denied*, 118 S. Ct. 625 (1997); *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) ("The concept of governmental 'honest services' . . . eludes easy definition"); *see also* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. on Legis. 153, 187-99 (1994); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. Rev. 223, 269-71 (1992). Indeed, in this case, the district court itself appeared to be unsure about the meaning of "honest services" at times:

> Mr. Berenson: [S]omewhere we would like your Honor to instruct the jury what a scheme to defraud of honest services means exactly.
>
> The Court: Well, what is meant by honest services?
>
> Mr. Berenson: Precisely. We don't want the jury to have the impression that if either [defendant] told a lie at some point, that's the scheme charged in count one.

(continued...)

misconduct most commonly takes the form of bribery, see, *e.g.*, *United States* v. *Paradies*, 98 F.3d 1266, 1282 (11th Cir. 1996), *cert. denied*, 118 S. Ct. 598 (1997); *United States* v. *Boots*, 80 F.3d 580, 592-94 (1st Cir. 1996), but it can also include self-interested official decisionmaking resulting from the receipt of kickbacks or the existence of an undisclosed personal financial stake in the outcome of an official decision. See, *e.g.*, *United States* v. *Grandmaison*, 77 F.3d 555, 557-59 (1st Cir. 1996); *United States* v. *Waymer*, 55 F.3d 564, 567 (11th Cir. 1995).

In all cases, however, the touchstone of honest services fraud is "undisclosed, biased decisionmaking for personal gain." *Sawyer*, 85 F.3d at 724. The Fourth Circuit explained, in a pre-*McNally* decision, "[t]he crux of this theory" as follows:

> [T]he fraud involved in the bribery of a public official lies in the fact that the public official is not exercising his independent judgment in passing on official matters. . . . When a public official has been bribed, he breaches his duty of honest, faithful and disinterested service. . . . [T]he official has been paid for his decisions, perhaps without even considering the merits of the matter. Thus, the public is not receiving what it expects and is entitled to, the public official's honest and faithful service.

United States v. *Mandel*, 591 F.2d 1347, 1362 (4th Cir.), *aff'd en banc in relevant part by an equally divided court*, 602 F.2d 653 (4th Cir. 1979) (citation omitted).

As this explanation makes clear, "honest services" and "official capacity" have specialized legal meanings that are beyond the common understanding of lay jurors. Indeed, to a lay juror, these terms probably connote the general honesty or

---

[13] (...continued)
App. 33a.

dishonesty of a politician; if a politician lies about matters of public or even private concern, even if those lies are unconnected to any official decisionmaking, the average juror would likely feel that the politician has failed to render "honest services" to the public. That is especially true where, as here, the prosecution expressly tells the jury in summation that a politician's failure to disclose facts about her private life in press interviews and conversations with friends and colleagues constitutes a failure to render honest services. See App. 50a ("That disclosure, that revealing of the relationship, that would have been honest services.").

Numerous decisions make clear that conduct of the kind for which petitioner was convicted -- lying to a reporter and others about one's love-life -- does not amount to "honest services" fraud, no matter how ignoble such conduct might be.[14] For example, in *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), the Eighth Circuit reversed the "honest services" mail fraud convictions of a state legislator who had accepted kickbacks in exchange for referring an architectural firm to the state officials responsible for awarding state architectural contracts, because the legislator himself played no official role in awarding the contracts. *Id.* at 1026. The Eighth Circuit explained that while the defendant had obviously acted unethically, and probably transgressed state laws, his conduct had not deprived his constituents of their intangible right to the honest and fair performance of his legislative responsibilities. See *id.* at 1025; see also *United States* v. *McNeive*, 536 F.2d 1245, 1252-53 (8th Cir. 1976) (reversing convictions where

---

[14] The legislative history of § 1346 provides further confirmation. Senator Mitch McConnell, who sponsored one of the bills that eventually became § 1346, declared that the statute "would not create federal jurisdiction over such things as false campaign rhetoric and campaign dirty tricks, which are not appropriate subjects for federal prosecution." 134 Cong. Rec. S8055 (daily ed. June 17, 1988) (statement of Sen. McConnell).

plumbing inspector violated city ordinance by accepting gratuities for issuing permits he had no discretion to deny).

Likewise, in *United States* v. *Czubinski*, 106 F.3d 1069 (1st Cir. 1997), the First Circuit reversed the convictions of an employee of the Internal Revenue Service who had violated IRS rules prohibiting employees from conducting unauthorized searches of confidential taxpayer information. *Id.* at 1071-72, 1079. The First Circuit found his behavior beyond the reach of § 1346 because "the government must not merely indicate wrongdoing by a public official, but must also demonstrate that the wrongdoing at issue is intended to prevent or call into question the proper or impartial performance of that public servant's official duties." *Id.* at 1076. Although the defendant in that case "clearly committed wrongdoing in searching confidential information," the convictions were reversed, because "there is no suggestion that he failed to carry out his official tasks adequately, or intended to do so." *Id.* at 1077.

In this case, the effect of the Eleventh Circuit's decision was to allow conviction on an entirely different basis: mere dishonesty. There can be no dispute on this point: the jurors themselves stated publicly that they convicted petitioner of lying to the media, and the jury instructions clearly permitted a conviction on this ground. Nonetheless, the Eleventh Circuit willfully blinded itself to the issues presented to it and to the implications of its own decision. It engaged in highly suspect judging, hiding behind a mute affirmance and a subsequent assault on straw-man arguments. Review of its decision would not only permit this Court to pass upon the important issues of law the Eleventh Circuit tried to bury, but also it would serve as a curb on those courts of appeals that attempt to avoid this Court's exercise of its jurisdiction on certiorari by engaging in decisional contortions.

* * * *

In sum, review of the Eleventh Circuit's judgment is warranted to resolve the conflict in the circuits, to establish national, uniform standards concerning the need to instruct juries about the meaning of "honest services," and to clarify that a public official does not commit "honest services" fraud by lying to the press and the public about matters outside her "official duties."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carter G. Phillips*
Thomas C. Green
Bradford A. Berenson
Griffith L. Green
Andrew E. Weis
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 3, 1999

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3433

D.C. Docket No. 95-4-CF-FTM-26

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICKI LOPEZ-LUKIS,
a.k.a. Vicki Lopez-Wolfe,
Defendant-Appellant.

No. 98-2179

D.C. Docket No. 95-4-CR-FTM-26

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICKI LOPEZ-LUKIS,
Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

(January 27, 1999)

Before ANDERSON and HULL, Circuit Judges, and HANCOCK,* Senior District Judge.

PER CURIAM:

AFFIRMED. *See* Circuit Rule 36-1.

Entered: January 27, 1999
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: May 17, 1999

*Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3433

D.C. Docket No. 95-4-CR-FTM-26

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICKI LOPEZ-LUKIS,
a.k.a. Vicki Lopez-Wolfe,
Defendant-Appellant.

No. 98-2179

D.C. Docket No. 95-4-CR-FTM-26

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICKI LOPEZ-LUKIS,
Defendant-Appellant.

Appeals from the United States District Court
For the Middle District of Florida

(May 5, 1999)

ON PETITION FOR REHEARING

Before ANDERSON and HULL, Circuit Judges, and HANCOCK*, Senior District Judge.

PER CURIAM:

The tenor of one of the arguments for rehearing suggests an element of illegitimacy about the practice of affirmance without opinion, such as is permitted by Eleventh Circuit Rule 36-1. More than 20 states and each of the federal circuits use summary dispositions similar to our Rule 36-1. Federal Rule of Appellate Procedure 36 contemplates decisions without opinions. In addition, the appellate courts of England, as we understand their practice, still decide most of their cases without written opinions. The rationale behind these rules and practices is that in many cases no jurisprudential purpose is served by writing an opinion. *See Furman v. United States*, 720 F.2d 263, 266 (2d Cir. 1983) ("A great many cases do not present any new or significant issue for which there are not ample precedents already in the published reports .... The use of summary orders permits judges to devote more time to the remaining cases that truly merit fully developed exercises of judicial craftsmanship."). In light of this widespread practice,

---

* Honorable James H. Hancock, Senior United States District Judge for the Northern District of Alabama, sitting by designation.

we are confident that we do nothing revolutionary when we decide to affirm a judgment without a written opinion.[1]

We note that our Rule 36-1, by its very terms, contemplates an affirmance without opinion only where "an opinion would have no precedential value," and also where one of the five enumerated circumstances exist. Appellant argues that the panel's affirmance, pursuant to Rule 36-1, was inappropriate in this particular case.

The primary substantive issue raised by appellant in her petition for rehearing derives from appellant's assertion that the panel's affirmance in the instant case decided that a public official can be convicted of "honest services" mail fraud in violation of 18 U.S.C. §§ 1341 and 1346 for lying to the press about a private romantic affair. Appellants argue that such a decision would not only be wrong, but would have significant precedential value, making the panel's decision in this case, affirming pursuant to Eleventh Circuit Rule 36-1, inappropriate. At the outset, we endorse the proposition that a decision such as appellant's petition posits would have had precedential value, and thus would not have been an appropriate use of Rule 36-1.

The flaw in appellant's petition for rehearing with respect to this issue lies in the petition's unwarranted assumption that the panel decided that a public official could be convicted of "honest services mail fraud" based upon dishonest statements to

---

[1] Whether to explain the decision in an opinion is, itself, a judicial determination. Furthermore, a Rule 36-1 disposition is no bar to review of our work by the Supreme Court. The Supreme Court reviews our judgments, not our opinions. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982). And, the Supreme Court does review, from time to time, our summary dispositions. *See, e.g., Williamson v. United States*, 512 U.S. 594, 598 (1994).

the media and the public about a private romantic affair. The panel did not decide that. People familiar with the case would realize how unlikely it would have been for an affirmance to have been based upon the ground posited in the petition for rehearing.

The indictment in the instant case charged a scheme to defraud in which the defendant accepted benefits to influence her performance of *official* acts as a member of the Board of County Commissioners. This was the government's theory of prosecution and the clear meaning of the government's argument to the jury. The jury instructions emphasized that the government must prove that appellant solicited or accepted benefits with the intention of being influenced in her *official* duties. There was ample evidence to support the jury's verdict that defendant accepted benefits to influence her in her *official* actions. The appellant's suggestion — that the affirmance in this case purported to hold that a public official can be convicted of "honest services" mail fraud based merely upon dishonest statements to the media and the public about a private romantic affair — contradicts her own petition for rehearing. The petition for rehearing acknowledges that she understood that the previous published opinion in this case "by Judge Tjoflat excluded the possibility that conviction on Count One could be predicated upon evidence that Mrs. Lukis lied to the press about her affair." Petition at 5 (citing *United States v. Lopez-Lukis*, 102 F.3d 1164, 1168.

It is important for litigants to know what a court's ruling is, that their cases were fairly considered. In addition, it is desirable generally for litigants to understand the rationale for the court's decision. Oral argument and summary affirmance serve that purpose. The Rule 36-1 affirmance in this case occurred after oral argument, in which the parties were given an opportunity to present their arguments and to hear from the court. We

thought the in-court discussion among the judges and the lawyers would make the panel's rationale apparent to the litigants when they learned of the Rule 36-1 affirmance.

With respect to the "honest services" issue, the matter was fully discussed at oral argument. In light of that discussion, in light of the government's clear position in closing argument at trial, in light of the government's brief on appeal, and in light of the previous published opinion in this case, we find it hard to understand how counsel could reasonably make the foregoing unwarranted assumption as to the meaning of the panel's affirmance. In addition, given the standard set out by Rule 36-1 itself, counsel should assume that, when a case is affirmed pursuant to that Rule, the court's reasoning does not include making new law or novel application of settled law.

The petition for rehearing also raises another question, a sentencing question. Appellant suggests that our affirmance in this case decided the sentencing question on a specific ground: that section 2C1.3 as a matter of law could not apply to appellant because she was a state or local official. Appellant goes on to argue that the sentencing question was wrongly decided and in any event would have precedential value. Amicus[2] joins appellant's petition for rehearing only with respect to the sentencing question. Again, however, our affirmance in this case did not decide the issue posited by appellant and amicus.[3]

---

[2] We granted the request of the National Association of Criminal Defense Lawyers to file an amicus brief in support of rehearing.

[3] For the reasons indicated below, we believe counsel should have realized that the panel did not decide the issue posited by appellant and amicus. However, we do think it is more understandable with respect to this issue, as compared to the "honest services" issue, that counsel may have desired

(continued...)

The sentence imposed by the district court employed the base offense level specified in U.S.S.G. § 2C1.7. Appellant argued in the district court that the appropriate Guideline was § 2C1.3 (Conflict of Interest), and appellant urged the district court to utilize the cross-reference subsection and thus look to the conflict-of-interest provision for the appropriate offense level. The district court declined to do so.

Both in the district court and in its brief on appeal, the government made two alternative contentions urging rejection of this argument by appellant. First, pointing to an ambiguous sentence in the commentary to § 2C1.3 and to language in a First Circuit case, the government suggested that § 2C1.3 was applicable only to federal officers and employees and not to state or local officials. Second, the government contended that defendant's conduct fit, in fact, within the heartland of § 2C1.7, and thus that this section was more appropriate than the conflict-of-interest section. Indeed, this second contention was the one emphasized by the government at oral argument before us. And our affirmance in the instant case was based upon this second government argument.

Although the district court at sentencing did mention the government's first contention, a fair reading of the district court's rationale at sentencing is that the district court found that appellant's conduct fell within the heartland of § 2C1.7, and thus that provision (and not the conflict-of-interest provision) more appropriately fit appellant's conduct. The PSI had specifically recommended rejection of appellant's objection because appellant's conduct was not as simple as an elementary conflict of interest (and therefore that appellant's conduct was

---

[3] (...continued)
elaboration. We realize that this sentencing issue was discussed less fully at oral argument.

not more specifically covered under the conflict-of-interest provision), but rather that § 2C1.7 was the more appropriate Guideline. The district court specifically adopted this position of the probation officer as stated in the addendum to the PSI. There is ample support in the record for the district court's finding that appellant's conduct went beyond a mere conflict of interest and was more appropriately covered by § 2C1.7 than by § 2C1.3. So, we determined that the district court did not err.

In deciding to affirm the sentencing issue pursuant to Rule 36-1, we made the decision (and believed the lawyers would understand the decision) against the background of the oral argument, the briefing, and the district court's explanation of its sentencing decision. In context, the parties should have understood that the summary affirmance was based upon the essentially fact-based argument which the government had made, and not upon the government's alternative, law-based argument. The alternative, law-based argument, if accepted by us as outcome determinative, would likely have been a decision of some precedential value, and thus would have been inappropriate for the use of Rule 36-1.

To reasonable lawyers who know the case and who think hard about our decision, the meaning of a Rule 36-1 affirmance is understandable. Rule 36-1 affirmances must be read in the context of the case presented, particularly the arguments presented in the briefs and the give and take among lawyers and judges at oral arguments. And when two readily apparent grounds might support an affirmance and if one would be making new law and one would not, the Rule 36-1 affirmance must be understood to rest not on the new-law ground, but on the settled ground.

The petition for panel rehearing is DENIED.

No member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,

v.

VICKI LOPEZ-LUKIS,
A/K/A VICKI LOPEZ-WOLFE, SYLVESTER LUKIS

CASE NO. 95-4-Cr-FtM-21

INDICTMENT

The Grand Jury charges that:

COUNT ONE

A. INTRODUCTION

1. At all times material to this indictment:

a. The Lee County Board of County Commissioners was a governmental body authorized and

empowered under the Constitution and laws of the State of Florida, to enact, in a manner prescribed by general law, county ordinances and conduct county business not inconsistent with general or special law.

b. As the chief legislative and policy making body for Lee County, the Board of County Commissioners, among other responsibilities, served as the final authority regarding the awarding of construction contracts and bonding contracts on Lee County construction projects.

c. The Board of County Commissioners consisted of five (5) commissioners, each elected in a county-wide election, and each representing a geographical district in Lee County.

d. The Lee County Board of County Commissioners received over $10,000 in federal funding annually in each and all material years, including 1990, 1991, and 1992.

e. Defendant Vicki Lopez-Lukis, a/k/a Vicki Lopez-Wolfe was a Lee County Commissioner serving on the Lee County Board of County Commissioners. She was elected in November 1990, and served until January 1993.

f. Defendant Sylvester Lukis was a lobbyist employed by Goldman-Sachs and Company, and Ogden Projects, Inc., to associate with the Lee County Board of County Commissioners, in each and all material years, including 1990, 1991 and 1992.

g. Defendant Vicki Lopez-Lukis, a/k/a Vicki Lopez-Wolfe and Defendant Sylvester Lukis had a personal and intimate relationship in 1991, 1992, and 1993.

h. Susan Anthony was a candidate for the Board of Lee County Commissioners in 1992. She campaigned as an anti-incinerator candidate, opposing the interests of the clients of Sylvester Lukis.

i. Ogden Projects, Inc., was a corporation doing business in and with Lee County in all material years.

j. Goldman-Sachs and Company was a corporation doing business in and with Lee County in all material years.

2. At all times material herein, Florida Statute § 838.015 provided in pertinent part:

> (1) "Bribery" means corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or another, any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty.
>
> (2) Prosecution under this section shall not require any allegation or proof that the public servant ultimately sought to be unlawfully influenced was qualified to act in the desired way, that he had assumed office, that the matter was properly pending before him or might by law property be brought before him, that he possessed jurisdiction over the matter, or that his official action was necessary to achieve the person's purpose.

3. At all times material herein, Florida Statute § 838.016 provided in pertinent part:

(1) It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, non-performance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty. Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal.

(3) Prosecution under this section shall not require that the exercise of influence or official discretion, or violation of a public duty or performance of a public duty, for which a pecuniary or other benefit was given, offered, promised, requested, or solicited was accomplished or was within the influence, official discretion, or public duty of the public servant whose action or omission was sought to be rewarded or compensated.

4. At all times material herein, Florida Statute § 836.05 provided in pertinent part:

Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to

extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his will, shall be guilty of a felony of the second degree.

5. At all times material herein, Florida Statute § 777.04 provided in pertinent part:

> A person who agrees, conspires, combines or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy.

6. At all times material herein, Florida Statute § 112.311 provided in pertinent part:

> (1) It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.
>
> (6) It is declared to be the policy of the state that public officers and employees state and local are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of

ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

7. At all times material herein, Florida Statute § 112.313 provided in pertinent part:

> (1) DEFINITION.--As used in this section unless the context otherwise requires, the term "public officer" includes any person elected or appointed to hold office in any agency, including any person serving on an advisory body.
>
> (2) SOLICITATION OR ACCEPTANCE OF GIFTS--No public officer, employee of an agency, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action or judgment of the public officer, employee, or candidate would be influenced thereby.
>
> (4) UNAUTHORIZEDCOMPENSATION--No public officer or employee of an agency or his spouse or minor child shall, at any time, accept any compensation, payment or thing of value when such public officer or employee knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer or employee was expected to participate in his official capacity.

8. At all times material herein, Florida Statute § 112.3143 provided in pertinent part:

> (3)(a) No county, municipal, or other local public official shall vote in his official capacity upon any measure which would inure to his special private gain; which he knows would inure to the special private gain of any principal by whom he is retained or to the parent organization or subsidiary of a corporate principal by which he is retained, other than an agency as defined in s. 112.312(2); or which he knows would inure to the special private gain of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of his interest in the matter from which he is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

9. At all times material herein, Florida Statute § 112.3148 provided in pertinent part:

> (3) A reporting individual or procurement employee is prohibited from soliciting any gift, food, or beverage from a political committee or committee of continuous existence, as defined in s. 106.011, or from a lobbyist who lobbies the reporting individual's or procurement employee's agency, or the partner, firm, employer, or principal of such lobbyist, where such gift, food, or beverage is for the personal benefit of the reporting individual or procurement employee, another reporting individual or procurement employee, or any

member of the immediate family of a reporting individual or procurement employee.

(4) A reporting individual or procurement employee or any other person on his behalf is prohibited from knowingly accepting, directly or indirectly, a gift from a political committee or committee of continuous existence, a [sic] defined in s. 106.011, or from a lobbyist who lobbies the reporting individual's or procurement employee's agency, or directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist, if he knows or reasonably believes that the gift has a value in excess of $100.

B. *SCHEME TO DEFRAUD*

From on or about November 1990, and continuing to in or about January 1993, in Lee County, Florida, in the Middle District of Florida, and elsewhere, the defendants,

VICKI LOPEZ-LUKIS,
A/K/A VICKI LOPEZ-WOLFE, and
SYLVESTER LUKIS,

and others known and unknown to the Grand Jury, did knowingly and willfully devise and intend to devise, a scheme and artifice to deprive the citizens of Lee County and the State of Florida of their intangible right to the honest services of VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE in her official capacity as Lee County Commissioner, and, for the purpose of executing and attempting to execute the scheme and artifice, did cause matters and things to be sent and delivered in the United States mails, the substance of which scheme and artifice to defraud is described more fully below.

C. *THE MANNER AND MEANS OF THE SCHEME*

10. It was part of the scheme and artifice to defraud that the defendant VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE would and did directly and indirectly agree to accept and did accept benefits, including pecuniary benefits, to influence her performance as a Lee County Commissioner, from defendant SYLVESTER LUKIS, who did offer, promise, and give pecuniary benefits to influence the performance of an act or for the past, present or future performance of an act within the official discretion of defendant VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE as a member of the Board of County Commissioners of Lee County, in violation of Florida Statute Chapter 838, and other laws, and to insulate, protect, promote, foster, further, facilitate and enlarge the scheme.

11. It was a further part of the scheme to defraud that defendant SYLVESTER LUKIS would corruptly provide pecuniary benefits to defendant VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE disguised as payments to a third-party, to gain and maintain influence over the performance of acts within her official discretion as a Lee County Commissioner, relating to Goldman-Sachs and Company and Ogden Projects, Inc., clients of defendant Sylvester Lukis, in violation of Florida Statute Chapter 838, and other laws, and to promote, foster, further, facilitate and enlarge the scheme.

12. It was a further part of the scheme to defraud that defendant SYLVESTER LUKIS and defendant VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE would and did hide and conceal their monetary and intimate relationship from the citizens of Lee County, in violation of Florida Statute Chapter 112, and other laws, and to promote, foster, further, facilitate and enlarge the scheme.

13. It was a further part of the scheme to defraud that defendant SYLVESTER LUKIS would and did corruptly provide pecuniary benefits to the family of defendant VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE to gain and maintain influence over the performance of acts within her official discretion as a Lee County Commissioner, and to promote, foster, further, facilitate and enlarge the scheme.

14. It was a further part of the scheme to defraud that defendant SYLVESTER LUKIS would and did cause to be made and obtained surveillance videotapes of one Susan Anthony, a candidate for the Board of Lee County Commissioners, and that he and defendant VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE utilized these videotapes to extort Susan Anthony, in an attempt to have her withdraw as a candidate, and thereby corruptly affect the composition and work of the Board of Lee County Commissioners, in violation of Florida Statute 836.05, and other laws, and to promote, foster, further, facilitate and enlarge the scheme.

15. It was a further part of the scheme to defraud that the defendants and others would and did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, the objectives of and acts done in furtherance of the scheme to defraud, all for the benefit of the aforementioned client companies of Sylvester Lukis.

D. *THE MAILING*

16. On or about September 9, 1991, at Lee County, in the Middle District of Florida the defendants,

VICKI LOPEZ-LUKIS,
A/K/A VICKI LOPEZ-WOLFE, and
SYLVESTER LUKIS,

and others who are both known and unknown to the Grand Jury, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did knowingly and willfully, place and caused to be placed in an authorized depository for mail matter to be delivered by the United States Postal Service, to George Butcher and representatives of Goldman-Sachs, and Co., an envelope containing a letter written to Lee Melsek of the Fort Myers News-Press, from defendant VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE.

In violation of Title 18, United States Code, Sections 1341 and 1346.

COUNT TWO

1. The grand jury realleges and incorporates by reference, as if fully set forth herein, paragraphs One through Nine of Count One of this Indictment.

2. On or about May 6, 1991, and continuing through January 1993, in Fort Myers, Middle District of Florida, the defendant,

VICKI LOPEZ-LUKIS,
A/K/A VICKI LOPEZ-WOLFE

solicited, received, retained and agreed to accept money, in that VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE an agent of a local government or local government agency receiving at least $10,000 in federal funding each year, namely the Lee County Board of County Commissioners, did

knowingly, willfully, and corruptly, solicit, demand, receive, accept and agree to accept money from SYLVESTER LUKIS, knowing that such money was provided, promised and tendered with the intent to cause defendant VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE to be influenced or rewarded in connection with business, transactions, and series of transactions of a value of over $5000 of the Lee County Board of County Commissioners, of which she was a member.

All in violation of Title 18, United States Code, Section, 666(a) (1) (B).

COUNT THREE

1. The grand jury realleges and incorporates by reference, as if fully set forth herein, paragraphs One through Nine of Count One of this Indictment.

2. On May 6, 1991, and continuing through January 1993, in Fort Myers, Middle District of Florida, the defendant,

SYLVESTER LUKIS,

did knowingly, willfully and corruptly offer, agree to give and did provide money to VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE an agent of a local government or local government agency receiving at least $10,000 in federal funding each year, namely, the Lee County Board of County Commissioners, with the intent to influence or reward VICKI LOPEZ-LUKIS, A/K/A VICKI LOPEZ-WOLFE in connection with any business, transaction, and series of transactions, of the Lee County Board of County Commissioners, which exceed $5000, namely the awarding of contracts.

All in violation of Title 18, United States Code, Section 666(a) (2).

COUNTS FOUR THROUGH ELEVEN

1. The grand jury realleges and incorporates by references, as if fully set forth herein, paragraphs One through Nine of Count One of this Indictment.

2. On or about the dates listed below, at Fort Myers in the Middle District of Florida, and elsewhere, the defendants,

VICKI LOPEZ-LUKIS,
A/K/A VICKI LOPEZ-WOLFE, and
SYLVESTER LUKIS,

did knowingly and willfully use a facility in interstate commerce, namely, Federal Express, as described below, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of unlawful activity, namely violations of Title 18, United States Code, Section 666 as charged in the indictment herein, and bribery in violation of Florida Statute Section 838.016:

COUNT	DATE	USE	FACILITY
FOUR	May 6, 1991	Washington, D.C., to Ft. Myers, Florida	Federal Express
FIVE	May 30, 1991	Washington, D.C., to Ft. Myers, Florida	Federal Express
SIX	May 31, 1991	Washington, D.C., to Ft. Myers, Florida	Federal Express
SEVEN	June 29, 1991	Washington, D.C., to Ft. Myers, Florida	Federal Express

EIGHT	July 9, 1991	Washington, D.C., to Ft. Myers, Florida	Federal Express
NINE	July 23, 1991	Washington, D.C., to Ft. Myers, Florida	Federal Express
TEN	July 25, 1991	Washington, D.C., to Ft. Myers, Florida	Federal Express
ELEVEN	August 22, 1991	Washington, D.C., to Ft. Myers, Florida	Federal Express

And thereafter did perform and attempt to perform acts to promote, manage, establish, carry on, and facilitate the promotion management, establishment and carrying on of said unlawful activity.

All in violation of Title 18, United States Code, Section 1952 (a) (3) and Section 2.

A TRUE BILL,

/s/ [Illegible]

FOREPERSON

CHARLES R. WILSON
United States Attorney

By: /s/ Douglas Molloy

DOUGLAS MOLLOY
Managing Assistant U.S. Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

VICKI LOPEZ-LUKIS
and SYLVESTER LUKIS

No. 95-4-Cr-FTM-21D

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, defendants Vicki Lopez-Lukis and Sylvester Lukis, through undersigned counsel, respectfully request that the Court instruct the jury on the elements of the charged offenses as set forth in the attached instructions.

Respectfully submitted,

/s/ Thomas C. Green

E.J. Salcines
One Tampa City Center
201 N. Franklin St.
Tampa, Florida 33602
(813) 223-2378
(813) 223-2478 (fax)

Thomas C. Green
Mark D. Hopson
Bradford A. Berenson
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
(202) 736-8711 (fax)

Counsel for Vicki and Sylvester Lukis

August 23, 1995

* * * * *

DEFENDANTS' TENTH PROPOSED INSTRUCTION: SCHEME TO DEFRAUD

The first element of the offense requires the prosecution to prove that Mr. Lukis and Mrs. Lukis knowingly and willfully devised a scheme to defraud the citizens of Lee County, Florida of their intangible right to Mrs. Lukis's honest services. The word "scheme" includes any plan or course of action intended to accomplish the unlawful objectives described in the indictment. It is not necessary that the prosecution prove every detail alleged in the indictment concerning the precise nature and purpose of the alleged scheme or that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that Mr. and Mrs. Lukis

knowingly and willfully devised a scheme to defraud substantially identical to the one described in the indictment.

The scheme charged in the indictment is one "to defraud the citizens of Lee County of their intangible right to [Mrs. Lukis's] honest services" by making financial payments to her. To "defraud the citizens of Lee County of their intangible right to honest services" means that Mr. and Mrs. Lukis must have devised a scheme to influence Mrs. Lukis's performance of her official functions, so that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners. In particular, in order to return a guilty verdict on this count, you must first find that the prosecution has proven beyond a reasonable doubt that Mr. and Mrs. Lukis devised a scheme whereby Mrs. Lukis would solicit, and Mr. Lukis would give, financial payments based on an understanding that Mrs. Lukis's actions as a County Commissioner would be influenced by such payments. If you do not believe that the prosecution has proven beyond a reasonable doubt that Mr. and Mrs. [sic] devised a scheme to corrupt Mrs. Lukis's honest judgments about public issues through financial payments, you must return a verdict of not guilty as to Count One.

* * * * *

Authority for Defendants' Tenth Proposed Instruction: Scheme to Defraud:

"Scheme": Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 34 (1985); *United States* v. *Haimowitz*, 725 F.2d 1561, 1568-69 (11th Cir.) (setting forth the elements of mail fraud), *cert. denied*, 469 U.S. 1072 (1984).

Scope of scheme: Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 34 (1985); 18 U.S.C. § 1346; *United States* v. *Biaggi*, 909 F.2d 662, 681 (2d Cir. 1990) (holding that defendant's "mail fraud conviction cannot survive reversal of his bribery conviction," on which "his mail fraud conviction rests"), *cert. denied*, 499 U.S. 904 (1991).

* * * * *

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

VICKI LOPEZ-LUKIS
and SYLVESTER LUKIS

No. 95-4-Cr-FTM-99D

DEFENDANTS' SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS

Defendants Vicki and Sylvester Lukis, through undersigned counsel, submit the following proposed jury instructions in addition to those already on file with the Court. These supplemental instructions are designed to address specific issues raised by the Court's draft instructions provided to the parties on Thursday, April 10, 1997. They are not intended to waive or abandon any request for instruction previously filed with the Court, nor should they be construed as an acceptance of any other instruction included in the Court's draft, many of which will be the subject of separate suggestions or comments at the

charge conference. Instead, these instructions merely address the several issues that require the most extensive adjustments in the existing draft.

DEFENDANTS' SUPPLEMENTAL INSTRUCTION NO. 1

To be placed at the end of charge on Count One, at page 11 of the Court's draft:

I caution you that it is not sufficient for conviction to conclude that the defendants engaged in a scheme, as I have just defined it for you. Instead, in order to be found guilty of the honest services mail fraud charged in Count One, Lukis and Lopez-Lukis must have devised a scheme whose object is the same as that alleged in the indictment. The sole object of the scheme charged in Count One is "to defraud the citizens of Lee County of their intangible right to [Lopez-Lukis's] honest services" by making financial payments to her. To "defraud the citizens of Lee County of their intangible right to honest services" means that Lukis and Lopez-Lukis must have devised a scheme to influence Lopez-Lukis's performance of her official duties as Lee County Commissioner through the making of illegitimate payments to her, such that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners. If you do not believe the prosecution has proven beyond a reasonable doubt that Lukis and Lopez-Lukis devised a scheme to corrupt Lopez-Lukis's honest judgments regarding her official actions through illegitimate financial payments, you must return a verdict of not guilty as to Count One.

Authority for Defendants' Supplemental Instruction No. 1:

United States v. *Lopez-Lukis*, 102 F.3d 1164, 1168 (11th Cir. 1997) ("The heart of count one is an allegation of a broad bribery scheme: Lukis paid Lopez-Lukis for political favors."); *id.* at 1169 ("The crux of th[e honest services mail fraud] theory is that when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest."); *id.* at 1170 ("the goal [of the scheme alleged in Count One] was for Lopez-Lukis to receive personal benefits in exchange for her efforts to secure Board action that favored the interests of Lukis's clients").

This supplement instruction is necessary to inform the jury of the nature of honest services mail fraud and to make clear that the scheme alleged in Count One is, in essence, a bribery scheme.

* * * * *

Respectfully submitted,

/s/ Bradford A. Berenson

E.J. Salcines
One Tampa City Center
Suite 2350
201 N. Franklin St.
Tampa, Florida 33602
(813) 223-2378
(813) 223-2478 (fax)

Thomas C. Green
Bradford A. Berenson
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
(202) 736-8711 (fax)

Counsel for Vicki and Sylvester Lukis

April 14, 1997

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

VICKI LOPEZ-LUKIS
and SYLVESTER LUKIS

No. 95-4-Cr-FTM-99D

TRANSCRIPT
OF JURY TRIAL PROCEEDINGS

---

* * * * *

MR. BERENSON: I just sort more or less want to reiterate it, so there's no confusion down that something that's said later in the instructions derogates —

THE COURT: That I put something that's alleged in the indictment in that paragraph, we'll take a look at that. All right. Okay.

MR. BERENSON: The other purpose of that instruction, your Honor, just so you're aware —

THE COURT: Yes.

MR. BERENSON: — there's a second, and in many ways more significant aspect of it, and that is an instruction of what honest services refer to. It may not be obvious to the jury that that means bribery, as the Eleventh Circuit said that it did in the Appellate opinion in this case, and so we felt that somewhere — you don't have to obviously use our language, although we think it's well supported in the cases.

THE COURT: Yeah.

MR. BERENSON: But somewhere we would like your Honor to instruct the jury what a scheme to defraud of honest services means exactly.

THE COURT: Well, what is meant by honest services?

MR. BERENSON: Precisely. We don't want the jury to have the impression that if either of these people told a lie at some point, that's the scheme charged in count one.

THE COURT: All right. I'll look at that and see if we can work it in appropriately. Number two, all right. It's all right. I don't think we need to put that in.

* * * * *

THE COURT: Okay. Anything further?

MR. BERENSON: Thank you. Next, we discussed briefly this morning the need to define honest services for the

jury. Now, I see that in the change that you've made on page nine, nine to ten --

THE COURT: Ten to eleven.

MR. BERENSON: Nine to ten --

THE COURT: This case incorporates that it may be put in as to what the nature of the charge is here.

MR. BERENSON: Yes. You expanded the description of the nature of the charge.

THE COURT: Yes.

MR. BERENSON: I think we may still need after the paragraph defining the word, "scheme," one sentence or two sentences, just making clear that the object of the scheme is the deprivation of honest services, and what that means is the, you know, nature of the charge; that is, illegitimate financial payments in return for influence over official actions.

THE COURT: Isn't that in here already adequately? And I'm going to read parts of the indictment to the --

MR. BERENSON: I'm just concerned. I'll tell you the source of my concern. I'll just be completely up front.

THE COURT: Yeah.

MR. BERENSON: You know, Mrs. Lukis on the stand today admitted to, you know, a dozen falsehoods that she told in the course of concealing her relationship with Mr. Lukis, and I just want to make absolutely sure that the jury understands that the term, "honest services," refers to the integrity with

which she performed her official duties, and not whether she was honest or dishonest in general, because I think it's not disputed that she was dishonest in a number of respects according to this.

THE COURT: I think it covers it adequately in here. I think it covers it. All right.

* * * * *

PROCEEDINGS

◆ ◆ ◆ ◆ ◆

(Whereupon the following discussions were had outside the presence of the jury.)

THE BAILIFF: All rise. This court is now in session. Be seated, please.

THE COURT: Good morning:

MR. GREEN: Thank you for coming out, your Honor.

THE COURT: All right.

MR. GREEN: I have thought about those remarks overnight and compared notes among my colleagues that were made to in respect to Mr. Molloy's argument. In my argument, I took pains to emphasize Count One related to the official action of Commissioner Lopez-Wolfe, and emphasized that the official action was in this case of her votes, and that the jury ought to look to her votes.

I want to read a paragraph from the -- I did that in reliance on a paragraph from the Appellate Court's opinion in our case, and I would like to just read that opinion -- I mean, that paragraph to you.

THE COURT: Surely.

MR. GREEN: "A proper understanding of the scheme alleged is essential to the resolution of this appeal." The heart of Count One is an allegation of a fraud, bribery scheme, that Lukis paid Lopez-Lukis for political favors. The present controversy centers on exactly what Lukis' money bought.

The indictment alleges that Lukis bribed Lopez-Lukis because he thought that she would give him two things, her vote on key matters and control of the board; that is, her influence to deliver a majority of the board's votes on those matters.

Now, the Appellate Court has said that the core of this Count One is the payment of money in return for votes on key matters and to control the board. That's the Susan Anthony aspect.

In his rebuttal argument, an argument which I obviously have no ability to respond to, Mr. Molloy emphasized repeatedly that Count One pertains to more than her votes, and he uses the phrase, "It's activity in her capacity as a Lee County Commissioner," and he pointed to several things, which as said and stated by him to the jury would provide the jury a basis for finding that she did not provide honest services to the Lee County citizens.

Several of those things were, for instance, the trading faxes with Goldman, Sachs, which, of course, no one ever came

to the stand and said was improper. The only witness that ever talked about it was his own witness, Mr. Butcher, who said it was absolutely routine and done all the time between investment banks and officials; but, more importantly, he made much of her failure to disclose -- on the radio show, disclose her relationship with Mr. Lukis.

Now, if it is, indeed, a crime for a politician or someone in public life to be less than candid, we would have a line stretching from here to New York waiting for prosecution, and that is not an offense, and yet I am terribly concerned. I really, really -- I say this to you with the utmost sincerity.

I am fearful that this jury because this ring of honest services so closely in the average person's mind relates to such basic behavior as honesty and candor, I am fearful that this jury is taking from that rebuttal argument and the fact that the instructions really never defined honest services, a feeling that if they find that she was not candid and honest about the relationship, which she lied about and didn't tell the Lee County voters, that that qualifies as a predicate for conviction under Count One.

That was said by the Government repeatedly in its argument in rebuttal. That was the core of the rebuttal argument. I mean, it was nothing. He didn't go through each vote and vote and vote and so forth as I did.

I would -- with all due respect to my colleague, Mr. Molloy, I am asking the Court to consider a curative instruction, so that the jury understands that while there are alleged in the indictment components of the behavior that are part of the scheme, the parts, such as it was a part of the scheme to not disclose, et cetera, cannot in and of themself support a conviction in this case.

There was much made of her failure to disclose in that argument, and it is not a permissible basis for conviction, and I am asking the Court to consider in accordance with the notions of fundamental fairness here some short, curative instruction that would -- that would bring them back to the core of Count One and correct what I think is -- I am positive it is now a notion circulating in that jury room; although I am indeed guessing, that nondisclosure, failure to tell the world, getting on a radio station and lying about it, getting to the newspapers and not being candid, that's not honest services, and that's what this -- I am convinced that they are sitting there believing that they have been deprived of honest services if the Government has proven beyond a reasonable doubt that she failed to disclose their relationship, and that isn't the law.

It's not the law certainly under mail fraud. They weren't charged with nondisclosure if, indeed, there is such a statute. I don't know that there is, and I would like the Court to consider some kind of short, curative instruction.

They haven't reached a verdict yet. They're still deliberating. There is something to be said that I should have been on my feet before they went in there, but I didn't, but I was thinking about it. I've continued to think about it, and my concern has grown more substantial in the interval, and I went back to this opinion; and I really feel that in fairness to the Defendants here and to the Government, because it should be clear what the crime is, that we should define for them what honest services is and so that they don't go off on this tangent.

* * * * *

THE COURT: Well, as everybody here recognizes, this is an unusual request. I don't know that I've ever read or seen anything about giving such a supplemental charge with respect

to a specific item. I know I've taken the time to go over all the requests of the charge itself and so forth with honest services.

The jury has the -- again, they have the indictment and the charge with them there, which I think is -- shows what paragraph 14 and 13 -- 14, I guess.

MR. GREEN: May I just have one other quick word?

THE COURT: Yeah, sure.

MR. GREEN: My remarks are not directed so much at the charge as given, although I do not agree to waive any objections to our one which was other than included.

Here's my dilemma, and, unfortunately, we don't have daily copy, and this is not my real grievance, and this is not a personal thing.

THE COURT: I know.

MR. GREEN: My real grievance is the argument made to the jury on rebuttal in which I am not permitted to respond to.

THE COURT: You would go on forever.

MR. GREEN: But, nevertheless, we have to deal with the situation --

THE COURT: Yeah.

MR. GREEN: — I am not permitted to respond, to which I believe was wrong, wrong legally and wrong factually, but I'm talking now wrong legally. The jury was basically told

by the Government that this is not a case about just official action. This is a case about more than official action. That phrase rings in my mind. I am absolutely sure that Mr. Molloy not only stated it once, he stated it several times. This is a case that involves more than official action.

This involves things she did in her capacity, in her capacity, and he drew the distinction between official action and in her capacity, and he brought the jury and directed their attention, in particular, to the nondisclosure and to the radio broadcast, and that -- and invited the jury to find that that was dishonest, that that was dishonest and that was part and parcel of old age here.

THE COURT: It's gets better the older you get sometimes.

MR. GREEN: I'm sorry, sir?

THE COURT: Sometimes it gets better the older you get.

MR. GREEN: They tell me if I hang in there long enough, it's going to single back.

He referred -- Mr. Berenson, who took notes, and so we brought one of them -- referred to the radio program as a cover-up, and said in this nondisclosure and so forth that there should not have been this cover-up. Well, of course, they're not indicted of any cover-up, and what I am fearful of -- to me, this is a very simple proposition.

If I were sitting in a jury, and I had to assess whether or not somebody had provided dishonest services to the community, it would not take a lot of persuasion for me to think

that, well, if they had been untruthful, they didn't provide honest services to the community, and that's the notion that was -- that was launched into that jury box; and, frankly, you know, when the Court reads the indictment, even though the indictment is just a charge in this unit, it's kind of loaded and it gets into all of that stuff, and I think the Judge, I -- I do not make these remarks lightly.

I've been in courtrooms for many, many, many years and feel that I have a sense of what goes on, and I'm telling you that sitting in my chair at my table I am absolutely convinced that this jury believes that cover-up or nondisclosure is enough to find that there was a deprivation of honest services, and that's what I am actually appealing to your discretion and judgment to cure for this short instruction; and it doesn't make any difference that -- I don't think it makes any difference, inasmuch as they have not returned a verdict and they're still deliberating, whether I appeal to your sound discretion at the instant the instructions were over and sought your intervention at that point or if I seek your intervention now.

I think our mutual objective is to insure a fair trial, and that the jury understand the issues and not be confused; and I am suggesting to your Honor that I believe there is confusion, and that the Court should intervene as judiciously as the Court would to cure this; and I'm not talking about some elaborate instruction, but I think it ought to be done.

* * * * *

THE COURT: All right. You know, you gentlemen have professionally and variably tried this case and haven't interrupted each other, except on a few occasions when you've objected, which is appropriate; but I've seen cases where there is a good amount of bickering back and forth, and that hasn't

occurred here; and it's a pleasure to sit on a case with such a well-tried case and so professionally addressed; and basic in all of this is the need for a contemporaneous objection in whatever is going on, and that's certainly permitted; and I think any instruction that I give now would overemphasize, and I'm not sure there is a need for any such instruction.

I haven't had the opportunity to get a look at what was said, and so much was said that it's hard to pinpoint what it was; but a contemporaneous objection so necessary, especially in circumstances like this where it's sustained, Mr. Molloy would have had the opportunity to correct if there was an error in it and proceed in another way; and I think the prejudice of doing it at this time would be so great that I don't feel that it's appropriate to do so. All right. I'll deny the request. All right, gentlemen. Just stand by if you would, please.

* * * * *

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

VICKI LOPEZ-LUKIS
and SYLVESTER LUKIS

No. 95-4-Cr-FTM-99D

JURY INSTRUCTIONS

---

* * * * *

All right. With that out of the way, now that you've heard the evidence and the arguments, it becomes my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine.

* * * * *

The summary of the indictment is as follows: Count One charges that the defendants knowingly and willingly utilized the Postal Service to assist them in executing a scheme to deprive Lee County citizens of their right to the honest services of County Commissioner Lopez-Lukis in her official capacity in violation of Sections 1341 and 1346 of Title 18, United States Code.

Count Two charges defendant Lopez-Lukis with corruptly accepting money with the intent that she would be influenced in connection with the business of the Lee County Commission in violation of Section 666 of Title 18, United States Code; and Count Three charges defendant Lukis with corruptly providing that money with the intent to influence Lopez-Lukis in connection with the business of Lee County in violation of the same statute.

And Counts Four through Eleven each charge both defendants for the use of a facility in interstate commerce, specifically, Federal Express with the intent to facilitate the promotion of bribery in violation of Sections 1952 (a) 3 and Section 2 of and Title 18 of the United States Code. The indictment includes 11 separate counts or charges and you will have to consider as to each count.

* * * * *

THE COURT: All right. Now, this Count One indictment charges the defendants violated Sections 1341 and 1346 of Title 18, United States Code, which makes it a Federal crime for anyone to use the Postal Service in carrying out a scheme to defraud.

In this case, the Government alleges that the defendants knowingly and willfully devised a scheme to defraud the citizens

of Lee County of their intangible right to Lopez-Lukis' honest services of a Lee County Commissioner by influencing Lopez-Lukis' performance of her official duties of defendant Lukis' illegitimate payments to her, and that they hereafter used the Postal Service to advance and further the scheme to defraud. I've already described that for you before.

Before the defendants can be guilty of mail fraud the Government must prove beyond a reasonable doubt, first, that the defendants knowingly and willfully devised a scheme to defraud the citizens of Lee County of their intangible right to Lopez-Lukis' honest services in her official capacity; and, second, that the defendants used the postal service by mailing or by causing to be mailed the September 9, 1991, mailing with the purpose of executing the scheme to defraud.

Now, the word, "scheme," includes any plan or course of action intended to deceive others and to arrive by false and fraudulent pretenses, representations or promises, the citizens of Lee County of their intangible right of honest services.

A statement or representation is false or fraudulent if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or cause to be made with intent to defraud. A statement or representation may also be false or fraudulent when it constitutes a half-truth or effectively conceals a material fact with intent to defraud.

A material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction. To act with intent to defraud means to act knowingly and with a specific intent to deceive someone; in this case, with the purpose of depriving the Lee County citizens of their right to honest services.

To find that defendant Lukis had the requisite to attempt to commit honest services fraud, you must find that he intended to influence or did corruptly affect defendant Lopez-Lukis' performance of her official duties; and, similarly, to find that defendant Lopez-Lukis had the required intent to commit honest services fraud, you must find that she solicited or accepted benefits with the intention of being influenced in her official duties.

You have heard evidence concerning a videotape incident involving a candidate for the Lee County Board of Commissioners in 1992. This incident itself has not been charged as a crime, and you may only consider it as evidence of the alleged honest services mail fraud scheme I have described.

It is not necessary that the Government prove all the details alleged in the indictment concerning the precise nature and purpose of the scheme, whether the material matter was itself false or fraudulent, but that the alleged scheme actually succeeded in defrauding anyone or that the use of the postal service was intended as a specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the defendants did knowingly and willfully devised or intended to devise a scheme to defraud, which is substantially the same as the one alleged in the indictment, and that the use of the Postal Service is closely related to the scheme because the defendants either mailed or caused to be mailed the September 9, 1991 mailing in an attempt to carry out or execute the scheme, and to cause the postal service to be used as to do an act with knowledge that the use of the postal service will follow in the ordinary course of business or where such use can reasonably be foreseen.

* * * * *

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

VICKI LOPEZ-LUKIS
and SYLVESTER LUKIS

No. 95-4-Cr-FTM-99D

PROSECUTION'S SUMMARY

---

* * * * *

MR. MOLLOY: The charge is depriving the citizens of her honest services. The charge is depriving the citizens of -- I'm sorry -- depriving the citizens of Lee County of her honest services as a commissioner. The citizens of Lee County deserved her honest voice. They deserved honest actions, and what they got was concealment and lies for nearly her entire term. Even if part of these actions were for love and part to

further Mr. Lukis' clients' interests, under the eyes of the law, they're still guilty.

The official actions of Ms. Lopez-Wolfe are what we're concerned with. Not their relationship, not the turmoil, the volatile relationship, the going back and forth. We are concerned with her official actions, and the acts of individuals speak much louder than words, not her explanations given years after the fact.

The things she did in the scope of her official capacity is what we ask you to focus on, the things she did in the scope of her official capacity. In the scope of her official capacity she sent a packet around to all county officials, city officials and to Mr. Lukis' clients, a packet containing almost nothing but lies from her. Sure, she got a couple of people to write versions of the meetings. Some of those people she wrote, wrote accurately, but what about her? What about what she said?

* * * * *

The different times that she came in contact with Marsha Segal-George, Lavon Wisher, with Harvey Lincoln, even with Lynn Marie Lane, her assistant, or with Lee Melsek, a reporter, those contacts are in her official capacity. She even goes so far as to try and hide that relationship from the public in a radio interview.

You'll have a chance to listen to all the evidence. All the evidence that was on that table you can review. One of those pieces of evidence is that tape, the tape of the radio broadcast; and the reason that I emphasize that to you is because these defendants describe themselves as out of their mind; and that tape shows a very clear, cold, calculating person who denies involvement and still manages to stick in a little knife to Susan

Anthony and Bruce Strayhorn, saying -- listen to the tape, listen to the words that are on the tape -- I'm not responsible for the rumors that are going out; with a clear, cold, calculating phone call from Sylvester Lukis talking to his client, Ogden Martin, talking about how that tape can be used, how that dirt can be used to affect voters. These aren't people out of their minds. These are people who knew exactly what they're doing, and their expressions of regret are misplaced.

The evidence on that tape is proof beyond a reasonable doubt, proof beyond any doubt that has a reason that the defendants are guilty of the crimes with which they are charged. The explanation that they didn't know what they were doing or that they were so humiliated that they had to send the tapes out to the media, out to the world, not only is not worthy of your belief, it doesn't make any sense.

On that table, that I'll gather together now and prepare for you, on that table is clear convincing evidence that you cannot explain away, that you cannot lie about, that you cannot get over, around or under that the defendants are guilty.

Just a few examples, the notes of that phone conversation with Mr. Treshler, that I mentioned before. You know, very seldom do we actually get what was going on in the mind of a person while they were committing a crime, but here we do. We have notes. Somebody actually took notes during a phone conversation of what was going on in Sylvester Lukis' mind when he was committing the crime.

The other evidence, the very same suggestions that were given to Sylvester Lukis about changing the requirements for the bond committee -- I'm sorry, for the bond selection, are the very same, the very same suggestions that show up as a directive from Ms. Lopez-Wolfe to Harvey Lincoln.

The article quoting her about wanting to terminate Marsha Segal-George. She got on that stand and she told that you she did not wish to terminate Marsha Segal-George, when in the paper, during that period of time, she said she would have. Why does she tell you that? Because she gave Marsha Segal-George an evaluation just a few weeks prior that was fantastic, and there's only one thing that happened in the interim, Marsha Segal-George told her boyfriend, Marsha Segal-George told her boyfriend that he could not have the projects that he wanted right away with this county, and that's the only thing that happened. So she has to say, I never intended on terminating her. I didn't tell anybody.

* * * * *

the letter to the reporter, look through that letter and focus on her replies denying the relationship,

* * * * *

the honest thing, the proper thing was to disclose the relationship before the first vote, before the first official act,

* * * * *

That disclosure, that revealing of the relationship, that would have been honest services. That would have been an honest voice.

* * * * *

They had lied repeatedly to promote their own interests, to promote their own interests, and that dishonesty, that deprivation of honest services should stop here.

* * * * *

Mr. Green is wrong. First of all, when he keeps talking about votes, we're talking about her official capacity. We're talking about much more than votes.

* * * * *

Her official duties, not just her votes, but her actions. When she gets on the radio and denies her is involvement in the videotape, she is on the radio because she's a County Commissioner. When she comes in contact with Marsha Segal-George or Lavon Wisher or those people, she's coming in contact with them because she's a County Commissioner. Now, it's just a focus. We can't limit it that way for her official actions.

* * * * *

APPENDIX I

FORT MYERS EDITION -- NEWS-PRESS
(Thursday, April 17, 1997, FORT MYERS, FLORIDA)

Lopez-Lukis Verdict -- Prosecution fails to prove bribery
By Mike Brassfield, News-Press staff writer

FORT MYERS -- After deliberating for 13 difficult hours, a jury acquitted Sylvester Lukis and Vicki Lopez-Lukis of bribery charges because jurors never bought the prosecution's bribery case, one juror said Wednesday.

"The state did not prove the bribery charges at all," said Joan Hermanns of Cape Coral. "It was all circumstantial evidence. The checks were tied to personal bills."

Hermanns said jurors became convinced the money that changed hands between Lopez-Lukis and Lukis were not bribes but gifts related to the couple's romance.

The Lukises testified that more than $2,000 the former commissioner received was to repay the county for long-distance calls to Lukis, and the amounts of the checks closely corresponded to the bills she received. The Lukises said another $1,500 went for an apartment they shared.

Hermanns also said jurors convicted Lopez-Lukis of mail fraud because she lied to a reporter.

"It was the only indictment we had proof of," Hermanns said. "She lied in the questions she filled out for the news reporter."

News-Press reporter Lee Melsek gave Lopez-Lukis written questions in September 1991 about her relationship with Lukis,

and the former commissioner admitted on the stand that she lied in several of her responses.

She testified that she lied for romantic reasons, to keep her affair with Lukis a secret.

But she sent copies of her answers to the brokerage Goldman Sachs & Co., one of Lukis' clients. That formed the basis for the single count of mail fraud, the charge alleging an overall scheme to deprive the citizens of Lee County of her "honest services."

Hermanns said the decision was a difficult one. "We thought we were going to have a hung jury for a while."

The jury was made up of 10 women and two men. One of the male jurors, William Ford, would say only that the jury based its decision on "the testimony provided, the instructions from the judge and the indictment."

FORT MYERS EDITION -- NEWS-PRESS
(Saturday, November 15, 1997, FORT MYERS, FLORIDA)

Former commissioner sentenced for fraud
by Peter Franceschina, News-Press staff writer

Former Lee County Commissioner Vicki Lopez-Lukis, convicted of corrupting her office through a secret affair with a lobbyist, got only one concession from the judge Friday -- 27 months in prison.

The sentence nearly matches in duration the turbulent time she served as an elected Lee County official.

Lopez-Lukis, however, won't have to report to prison until she exhausts her appeal, a process that could take nine months or more.

U.S. District Judge Lee Gagliardi rejected several defense arguments that if successful could have resulted in less prison time for Lopez-Lukis, but he decided against giving her a maximum of 33 months under federal guidelines.

Gagliardi said he felt the lesser sentence was punishment enough and would serve as a deterrent to public officials who think they are above the law. "It sends the message," he said.

Defense attorneys for Lopez-Lukis -- acquitted in April of 10 bribery counts along with her lobbyist husband, Sylvester Lukis -- vowed an immediate appeal of her conviction and sentence.

They say Lopez-Lukis, 39, was wrongfully convicted of mail fraud -- the overall charge alleging she compromised her office and deprived citizens of her "honest services" by accepting

about $5,000 in bribes from her then lover Lukis -- because the jury misunderstood the legal aspects of the charge.

Arthur Hohmann of Cape Coral, who sat on the jury during the two-week April trial, attended the sentencing in federal court in Fort Myers. He said the jury's verdict on the single conviction, which came after about 13 hours of deliberations over two days, was a compromise. "That trial didn't prove anything," Hohmann said. "She should have walked."

He said he was upset by the prison term because he felt Lopez-Lukis only deserved to be fined. He also said he regretted voting for conviction. "This should not have been," he said. "I'm devastated. I thought it would be a slap on the wrist."

Assistant U.S. Attorney Doug Molloy, who prosecuted the case, told the judge Friday that Lopez-Lukis didn't deserve a break on her sentence.

"This case is not about the private life of a public official. We don't prosecute public officials for their love lives. We prosecute them for violating the laws we all share," Molloy said.

Defense attorney Thomas Green said Lopez-Lukis maintains her relationship with Lukis never influenced her official actions or her votes.

He also said she should not have been convicted of the mail fraud charge because she and her husband were acquitted of bribery.

After the verdict, juror Joan Hermanns, contacted at home, said Lopez-Lukis was convicted for lying to News-Press reporter Lee Melsek about her relationship with Lukis. The

commissioner mailed written denials of the relationship to Goldman Sachs officials, and that became the legal linchpin for the mail fraud charge, which also covered a number of other allegations.

Green said Lopez-Lukis should not have been convicted for lying to a reporter. "That's not a crime and she was convicted for that," said Green, adding it is very difficult to overturn a jury's verdict on appeal.

Hohmann, the juror who attended the sentencing, also said there was confusion among the jurors as to the elements of the charge.

Green's appeal will focus, in part, on that issue. He said the judge should have given the jury an instruction explaining the legal concepts behind the "honest services" fraud charge, but Gagliardi denied several defense requests to give a jury instruction on that.

Molloy said Hohmann's comments were at odds with what other jurors told the prosecutors team about their deliberations. "The remarks made by this juror don't reflect the jury's verdict or the information we received about the deliberation," he said.

Lopez-Lukis addressed the judge briefly. "I come before you publicly today -- as I did six months ago -- to say how sorry I am for my action," she said with a catch in her voice.

Outside the courtroom, she said she was disappointed the judge didn't accept the defense's view on the legal issues that could have reduced the sentencing guidelines.

She also expressed hope she will prevail in her appeal.

During the trial, prosecutors sought to show Lopez-Lukis accepted bribes from the lobbyist to influence her county decisions. Lukis represented Ogden Projects Inc., the builder of Lee County's $200 million trash incinerator, and Goldman Sachs & Co., which refinanced $35 million in bonds for Southwest Florida International Airport.

The defense said every penny the highly paid Lukis gave Lopez-Lukis was for love and used to pay personal expenses, such as her long-distance telephone bills and her apartment they shared when Lukis was in town. The couple later married.

Lopez-Wolfe -- as she was then known -- abruptly resigned her commission seat in January 1993, a little over two years after taking office. By then, her on-again, off-again relationship with Lukis was the focus of a state and federal investigation.

She dropped Lukis several months before the 1992 commission campaign got into full swing. She had returned to a former lover, Fort Myers lawyer-lobbyist Bruce Strayhorn, who represented Waste Management, the owner of Lee County's landfill that stood to lose money if the incinerator were built.

Strayhorn was also dating anti-incinerator commission candidate Susan Anthony. Private investigators hired by Lukis to determine if Strayhorn was dating Lopez-Lukis filmed Strayhorn out on the town with Anthony.

Lukis called his former lover to tell her Strayhorn was cheating on her. Lopez-Lukis threatened Strayhorn with exposing his affair unless Anthony dropped out of the race. Anthony stayed in the race but lost the runoff to pro-incinerator incumbent John Manning.

[Photograph and caption omitted]

NAPLES DAILY NEWS

Lukis juror says guilty verdict was a mistake
by Charlie Whitehead, Staff Writer

FORT MYERS -- Arthur Hohmann of Cape Coral says he was "flabbergasted" as he sat in federal court in Fort Myers on Friday and watched former Lee County commissioner Vicki Lukis receive a 27-month sentence for honest services fraud.

Hohmann, known as juror No. 12 during the three-week trial in April, now says he and the 11 others who found her guilty made a mistake.

"We all in the jury room thought this was a misdemeanor," Hohmann said after Friday's sentencing. "We thought it would be a $100 fine."

Hohmann said the jury agreed to hand down the conviction to satisfy a single juror who believed that with so many charges, Lukis had to be guilty of something.

"We couldn't find one iota of proof that a crime was committed," Hohmann said. "We had one juror that said she must be guilty of something or they wouldn't have gone to all this trouble. This thing would have been hung, so we found she lied to some reporter based on something she mailed."

Vicki Lukis admitted at trial she made false answers to questions submitted to her by Fort Myers News-Press reporter Lee Melsek and that she sent those false answers to others as well. Hohmann said the jury returned the single guilty verdict thinking she'd face a small fine and no jail time.

"Twenty-seven months? Holy Christ," he said.

Hohmann said he learned by reading the paper this week that Lukis could face more than two years, and went to the courthouse hoping to undo what the jury did.

"I would have explained," he said. "I thought if I explained it might have had some weight."

Hohmann said he thinks the jury made a mistake and that both Vicki and Sylvester Lukis should have been acquitted of all charges.

"Twenty-seven months in jail? That's awful," he said. "And they didn't prove a damn thing. I feel very bad to be responsible for that."

NEWS-PRESS AT FORT MYERS

MAILBAG -- Reverse Lopez-Lukis sentence

[Letter 1]

Something has to be done to reverse the sentencing of Vicki Lopez-Lukis. A great miscarriage of justice is about to take place, carried out by the federal government.

Although she was charged with 20 counts ranging from bribery to mail fraud, there was not one shred of evidence to prove she was guilty of any of these crimes. One juror felt she must be guilty because the government would not prosecute an innocent person. Ha, Ha, Ha.

The jury settled for mail fraud because we believed that such a crime would be punishable by a small fine of $100 or less and we wouldn't hang the jury and we would be able to go home for the weekend. We also felt that this would clear up the matter and allow everyone to go on with their lives.

I'm sorry I gave in.

ARTHUR HOHMANN
Juror No. 12
Cape Coral

[Letter 2]

27 months seems unfair

With regard to the letter in the Feb. 20 edition of the News-Press from Thomas C. Green, attorney for Vicki Lopez-Lukis,

I can understand his disappointment over the prospect of her spending 27 months in the slammer for lying to the press. After all, our beloved president, William J. Clinton lied to the press, his wife, his employees and, in fact, lied to the entire nation. His sentence is about 24 months in office.

It just doesn't seem fair. Would it be possible for Vicki to have about 13 in the pen, 13 in the White House, and swap the time with Bill? It would give him time to write his memoirs away from the pressure of Ken Starr, Henry Hyde and the like. In fact, he already would have served 13 months should he be convicted of something else.

ROBERT W. HALLER
Fort Myers Beach

APPENDIX J

THE NEW YORK TIMES
Sunday, March 14, 1999

CASELOAD FORCING TWO-LEVEL SYSTEM FOR U.S. APPEALS

MORE ONE-WORD RULINGS

Tens of Thousands of Cases Get Limited Review, According to Judges and Scholars

---

By WILLIAM GLABERSON

FORT MYERS, Fla. March 11 -- A crushing load of cases is forcing a reshaping of the Federal appeals courts, creating a two-level justice system in which tens of thousands of appeals receive limited reviews, judges and legal scholars say.

Some judges say the changes are necessary so that judges on the appeals courts, second in importance only to the Supreme Court, can cope with the steadily growing number of cases without increasing the length of time people must wait for rulings.

But as fewer than half of all Federal appeals cases are argued before judges and only a fourth of all decisions are rendered in full published opinions -- many decisions consist of a single word, like "affirmed," upholding the lower court's decision -- critics say the country's circuit appeals courts are changing their role, with people's legal rights often damaged by the shift.

Instead of reviewing every case that comes before them, as Federal law requires, the critics say, the appeals courts are becoming more like the Supreme Court, which has the power to decide which cases it will hear.

Complex civil rights, antitrust and other cases that appeals judges deem important get the same detailed consideration as always. But some judges and legal scholars say that entire classes of appeals deemed routine, such as petitions from prison inmates and individuals' disability claims under Social Security, get abbreviated attention as staff lawyers sort out cases to recommend for full hearings.

"It is a two-track system, and the tracks basically get allocated by non-judges," said Patricia M. Wald, a judge on the Federal Court of Appeals for the District of Columbia.

The country's 12 regional Federal circuit courts began reorganizing themselves in the 1980's, introducing shortcuts in the way they review appeals to help judges cope with the number of cases, which grew to 53,805 last year from 33,360 in 1985.

In one of the most controversial changes, the appeals courts created new staff lawyer positions, permanent employees with the authority to screen and, some critics say, to effectively decide thousands of cases by giving judges brief summaries of recommended decisions.

Now the question of whether the new shortcuts are fair has been put squarely before one of the appeals courts that has led the changes, the United States Court of Appeals for the 11th Circuit in Atlanta, in an appeal of a political corruption case here in Fort Myers, on Florida's Gulf Coast.

In the case, lawyers for a former county commissioner convicted of depriving her constituents of her "honest services" are trying to challenge a one-word ruling upholding the conviction -- "affirmed" by a three-judge panel. Her lawyers contend that it is not even possible for them to tell why her appeal was denied, much less to try to appeal to the Supreme Court.

The lawyers have asked the full 12-member court to review the decision as well as the court's streamlined appeals procedures.

The case has attracted national attention among defense lawyers, partly because the Atlanta court is known as one of the architects of abbreviated appeals procedures.

Some judges and scholars say the proliferation of one-word decisions and other abbreviated procedures is shortchanging litigants in the appellate process by limiting the consideration given to their cases by appeals judges.

"We have so many procedural shortcuts that appeals today are processed in a kind of assembly line and the judges are not paying enough attention to individual cases because they can't," said Prof. Thomas E. Baker at Drake University law School in Des Moines, who has written extensively about the appeals courts.

With the Supreme Court giving full review to no more than 200 cases a year and the highest courts of many states also limited in the number of cases they can hear, some legal scholars say, the increasing use of abbreviated review procedures by intermediate appeals courts means litigants are quickly losing the right to meaningful appeals.

One measure of the abbreviated treatment given to many cases, some judges and scholars say, is a sharp decline in the number of decisions Federal appeals courts publish in law books. Unpublished decisions do not establish precedents.

In studies of unpublished decisions, two law professors, William L. Reynolds of the University of Maryland and William M. Richman of the University of Toledo, say the rulings are usually so succinct that it is impossible to discern the facts of a case or the reasons for the judges' ruling.

Court statistics show that Federal appeals courts publish only 24 percent of their decisions, down sharply from 54 percent in 1985. "It is sort of a formula for irresponsibility," said Richard A. Posner, the chief judge of the United States Court of Appeals for the Seventh Circuit in Chicago. "Most judges, myself included, are not nearly as careful in dealing with unpublished decisions."

Some Federal appeals judges say many cases are given abbreviated reviews because they are frivolous. No one, they say, is being denied careful appellate review.

"The Federal courts," said J. Harvie Wilkinson 3d, the chief judge of the Court of Appeals for the Fourth Circuit in Richmond, "have developed sophisticated management techniques that differentiate between cases that are genuinely difficult and challenging and those which are straightforward." His court had the highest percentage of unpublished decisions last year, 90 percent.

The new methods of handling appeals are necessary, some judges acknowledge, because many Federal appeals judges have fought efforts to increase their number. The judges have said the quality and collegiality of the Federal bench would be

diluted if too many new judges were added. The number of judges on the circuit courts has increased to only 167 from 156 in 1985.

In the case here in Fort Myers, Vicki Lopez-Lukis, a former Lee County Commissioner, was convicted in 1997 of depriving her constituents in her honest services by taking payments from a Washington lobbyist, Sylvester Lukis, while considering government projects he was promoting for his clients. At the time, the two were having an affair. They are now married.

Federal prosecutors charged the two with 11 counts each in the bribery case. Mr. Lukis was acquitted of all charges while Mrs. Lukis was convicted of only one count. The couple contended that the payments were to help her pay for an apartment the two shared here and had not influenced her votes.

After a jury convicted Mrs. Lukis of one count and she was sentenced to serve 27 months in prison, she appealed. On Jan. 27, the three-judge appeals panel handed down its one-word decision.

The 11th Circuit Court handles Federal appeals from Alabama, Florida and Georgia. Each of the circuit courts across the country reviews cases in panels of three judges. Unusual cases are sometimes viewed after a three-judge panel decision by all the judges on a circuit, typically a dozen or more.

Mrs. Lukis's lawyer, Thomas C. Green, a prominent Washington defense lawyer, says his client's case shows how unfair the shortcuts in the courts have become because he raised a series of legal arguments that he said were far from frivolous. Among other things, he said that if the appeals panel had issued an opinion defining "honest services" he would have had a

better chance of convincing the Supreme Court to review the case.

Partly because of that concern, Mr. Green has asked the full 12-member 11th Circuit Court to make a rare decision to review the filing of the three-judge panel in Mrs. Lukis's case and use it to limit what he says are unfair procedures.

The National Association of Criminal Defense Lawyers filed a brief as a friend of the court, asserting that shortcuts like the one-word opinions are diminishing the public's confidence in the courts.

The debate in the case shows how the dispute over the abbreviated appeals proceedings is playing out across the country. The Federal prosecutor in the case, Douglas F. Molloy, said fuller review of Mrs. Lukis's appeal would waste the court's time.

"When they issue a one-word opinion," Mr. Molloy said, "it's a way of saying, 'You brought an appeal that had absolutely no merit.'"

For defense lawyers, such succinct rulings are frustrating because they make it virtually impossible to appeal further. If a Federal appeals court has not even specified its reasons for upholding a lower court ruling, the changes that the Supreme Court will consider a case are small.

In an interview here, Mrs. Lukis said the one-word opinion left her wondering whether political influence or bias against her as a Hispanic woman had played a party in her case. "They didn't tell me why they decided what they decided," she said. "I think they owe me that."

Terse rulings in criminal cases that are deemed routine often benefit prosecutors, as courts uphold convictions without having to state legal reasons. But sometimes it is prosecutors who are put at a disadvantage.

When a Federal appeals court ruled in 1996 that there were legal problems with the politically popular conviction of Charles H. Keating Jr., the former savings and loan executive convicted of defrauding customers, the court issues a two-paragraph decision that did not mention some prosecution arguments.

In their studies of the use of brief circuit court decisions, Professors Richman and Reynolds have suggested that sketchy rulings may sometimes be used by judges who want to reach a certain legal result but are not anxious for their decision to be scrutinized.

Whatever the reasons, Professor Reynolds said, the rapid growth of shortcuts in the appeals courts means that people involved in legal cases are not getting the attention from Federal appeals courts that most of them expect.

"Most people think if you have an appeal, your lawyer argues the case and a judge decides," he said. "That's not what we have. We have a system where there is often no argument, there is no requirement for a judge to write a decision and the decision making is largely done by people who are not judges."

[Photograph, caption and graph omitted]

APPENDIX K

ABA JOURNAL **(Aug. 1999)**

Big Objections to Brief Decisions
Critics contend one-word appellate rulings give short shrift to justice
By William C. Smith

Facing a prison sentence of 27 months for mail fraud, Vicki Lopez-Lukis appealed to the 11th U.S. Circuit Court of Appeals. A former Lee County, Fla., commissioner, she had been convicted of taking bribes to favor the clients of a lobbyist who also was her lover.

Her appeal asserted error in the jury instructions and sentencing. But the Atlanta-based court disposed of her appeal last January with a single word: "Affirmed."

Perhaps stung by publicity surrounding the case, the panel issued a nine-page opinion on May 5 defending its prior one-word ruling. The court insisted it did not give short shrift to Lopez-Lukis' appeal, as some had claimed. *United States v. Lopez-Lukis*, No. 98-2179.

Guessing Game

The case exemplifies the growing use of no-comment decisions by circuit courts. Some judges and observers defend the practice as an appropriate, and perhaps inevitable, means for swamped circuit judges to dispose of meritless appeals. However, critics charge that the quality of appellate justice suffers, and further appeals are next to impossible, when the courts affirm without explanation.

Responding to a motion for reconsideration, the 11th Circuit panel said summary affirmances "must be read in the context of the case presented, [the arguments] in the briefs, and the give and take among lawyers and judges at oral argument." If a decision might be based on alternative theories, the court concluded, the outcome "must be understood to rest not on the new-law ground, but on the settled ground."

In Lopez-Lukis' case, the court said its rationale would be clear to "reasonable lawyers who know the case and who think hard about our decision."

Given the summary appellate procedures in the federal system, 20 states and England, the court said "[W]e are confident that we do nothing revolutionary when we decide to affirm a judgment without a written opinion."

Quoting a 1983 decision by the 2nd U.S. Circuit Court of Appeals, *Furman v. United States*, the court noted that a "great many cases do not present any new or significant issue. . . . The use of summary orders permits judges to devote more time to the remaining cases that truly merit fully developed exercises of judicial craftsmanship."

As permitted by Rule 36 of the Federal Rules of Appellate Procedure, the 11th Circuit allows one word affirmances when it finds the District Court was right on the law and the facts, and when a written opinion "would have no precedential value."

Douglas Molloy, the assistant U.S. attorney in *Lopez-Lukis*, says appeals with no merit can appropriately be resolved without opinion. Circuit judges and court staff are extremely conscientious, and give each case the attention it deserves, Molloy says. A summary disposition "is just the court's way of saying, 'Look, there's nothing there.'"

[Photograph and caption omitted]

Busy Docket Breeds Brevity

The 11th Circuit, covering Florida, Georgia and Alabama, is one of the busiest federal appeals courts in the nation, resolving about 3,000 appeals on the merits annually. It also leads the circuit courts in issuing decisions that have not included written opinions, with 502 such rulings last year.

Not far behind are the 3rd Circuit based in Philadelphia (404 no-comment decisions) and the 8th Circuit based in St. Louis (384 such decisions). Recently, though, the 3rd Circuit has decided to try to curb the number of rulings without rationales.

"We realized that this was a mistake, that we owed the bar more," says Chief Judge Edward Becker of the 3rd Circuit. This year, he says, his colleagues have committed to "virtually eliminate" judgment orders as a case management tool.

That move would likely be applauded by critics such as Paul Peterson, a staff attorney with the National Association of Criminal Defense Lawyers.

He notes that while court-appointed appellate counsel must search the record for reversible error, "There is no comparable rule for the courts. If a panel decides at 4 o'clock on a Friday afternoon to [summarily affirm] the last 10 cases on its docket, there's no check or balance, no oversight."

The NACDL filed an amicus brief urging reconsideration in *Lopez-Lukis*, criticizing the appeals court for giving little consideration to a substantive sentencing issue.

Disillusionment

In a similar brief filed in a 9th Circuit case, *United States v. Brian*, No. 97-50285, the NACDL said that summary and unexplained dispositions "are not just disappointing, they are disillusioning and lessen respect for the process."

A written opinion, the brief continued, "permits litigants and the public alike to review, and appreciate, the accuracy of the logic employed and propriety of the legal rules invoked."

Law professor William Richman of the University of Toledo observes that circuit courts are more likely to give full-scale review, including oral argument and a detailed decision, in cases deemed important, such as securities litigation.

Richman, a well-published expert on unpublished opinions, says more routine cases are often shunted off to staff attorneys for review, and an unelaborated or cursory affirmance is issued.

In testimony last year before the Commission on Structural Alternatives for the Federal Court of Appeals, Richman and said this practice falls disproportionately on the "poorest and least powerful federal litigants since theirs are the 'trivial' cases: Social Security litigation, civil rights cases, pro se appeals and prisoner petitions."

The commission, chaired by former Supreme Court Justice Byron White, noted in its December 1998 report that summary dispositions may have made circuit courts more efficient, "but at some cost to the appearance of legitimacy of the appellate process."

The report noted that federal litigants' statutory right to circuit court review imposes a corresponding "obligation on the

court to consider a properly presented appeal and decide it on its merits." However, the growing use of unelaborated opinions has "blurred the distinction between obligatory and discretionary review."

The commission rejected a proposal that appellate jurisdiction be made discretionary across the board, but suggested that circuit courts might be allowed to deny review in certain categories of cases that are "generally fact intensive and controlled by existing precedent."

Some appeals courts endeavor to keep one-word affirmances to a minimum. The D.C. Circuit, for example, issued just one such opinion last year, and the 7th Circuit based in Chicago issued only 37.

Judge Richard Posner of the 7th Circuit says his court usually tries to articulate grounds for a decision. The practice may reveal some areas of disagreement with the lower court's ruling, he says.

However, the former law professor -- who is among the federal bench's most prolific authors of judicial opinions and scholarly texts -- does not believe every appeal warrants judicial wordiness. The District Court may be affirmed in a single sentence or citation "if there's only one issue and it's frivolous," he says.

Judge Patricia Wald of the D.C. Circuit believes appeals that involve no new area of the law can often be resolved in unpublished memorandum opinions, without all the "pomp and circumstance" required for the Federal Reporter.

However, she is "very skeptical and suspicious" of one-word rulings that give no clue about the circuit court's rationale. She

says her court avoids such judgment orders, although it occasionally affirms "for the reasons stated in the District Court's opinion."

Nosedive in Judgment Orders

The 3rd Circuit's new stand against summary dispositions has produced dramatic results so far, according to the circuit clerk's office. The court has issued only 15 judgment orders in the first four months of 1999, down 95 percent from the 280 in the same period in 1998.

The court made up most of the difference with a fivefold increase in unpublished per curiam and memorandum opinions, which briefly explain the court's rationale.

According to Judge Becker, the court has so far managed to keep current on its work, defying fears that decreasing judgment orders would necessarily increase the circuit's backlog.

Although the new policy may involve more work for his already busy colleagues, Becker thinks the change is worthwhile. "It was the right thing to do, so we just did it," he says.

No Comment [Text included, graphic omitted]

Last year, the federal appeals courts disposed of 25,020 appeals on the merits. About 6 percent of the total were disposed of "without comment," meaning the court did not expound the law as applied in the case, or did not explain the reasons for the ruling.

Type of ruling	Number	% of total
Published opinion	6,173	24.7
Unpublished opinion	17,210	68.7
Disposition without opinion	1,524	6.1
Oral ruling	113*	0.5

* All from 7th Circuit

The following circuit courts reported one or more dispositions without comment in 1998.

Court	Number	% of Merit Decisions
D.C.	1	0.1
3rd	404	23.4
5th	78	2.1
7th	37	2.6
8th	384	20.9
9th	118	2.8
11th	502	16.6

Source: Administrative Office of the U.S. Courts

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. 97-1429

UNITED STATES

v.

FRANCIS H. WOODWARD

JURY INSTRUCTIONS

---

* * * * *

Counts 2 through 13 of the indictment charge that the defendant committed mail and wire fraud. Now, I want to emphasize right at the outset that these are charges. This indictment is just several pieces of paper that are designed to frame the issues for you. It doesn't constitute evidence. It is simply the way in which a case is brought to a group of people like you for resolution. So, you don't draw any conclusions that something has been established because it appears on this piece of paper. This is simply the charge. And the charges in Counts 2 through 13 are that the defendant engaged in violation of the mail and wire fraud statutes. In order to meet its burden of proof beyond a reasonable doubt with regard to Counts 2

through 13, the Government must establish beyond a reasonable doubt each one of the following essential elements: First, that the defendant knowingly and willfully participated in a scheme or artifice to defraud with a specific intent to defraud. Now, on that note, let me focus you on two words that pop up throughout. That is the words "knowingly" and "willfully." We are dealing here with the criminal law. We're not dealing with mistakes that people might make, negligence that people might engage in, mere inadvertence. And, so, knowingly means to act voluntarily and deliberately rather than mistakenly or inadvertently. The Government must show that the defendant acted knowingly -- excuse me -- voluntarily and deliberately rather than mistakenly or inadvertently.

Willfully means to act knowingly and purposely with an intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or disregard the law.

And we have also talked about intent to defraud here although the words "knowingly" and "willfully" show up in the conspiracy clump, in the mail and wire fraud clump, and in the Travel Act clump. But focusing specifically on the mail and wire fraud, there is a requirement to show an intent to defraud. And that means to act knowingly and with a specific intent to deceive for the purpose either of causing a loss to another or bringing about gain to one's self or for both of those purposes.

Like every other issue in this case, the question of whether or not the defendant acted knowingly, whether or not he acted willfully and, more specifically, with reference to the mail and wire fraud statutes, whether or not he acted with intent to defraud is a question of fact that you'll have to decide.

So, first basic element, the Government must prove that the defendant acted knowingly and willfully in participating in a scheme or artifice to defraud with specific intent to defraud.

The second element is that the mails or interstate wires were used in furtherance of that scheme. During the course of argument, counsel properly said, "Look, we'll talk about mail and wire fraud together because basically they're the same thing." But what they are is the jurisdictional hook that permits the Congress of the United States to regulate to some degree the activities of state legislators. The Congress has the right to ensure the integrity of the mails or, at least, to ensure that the mails aren't used in furtherance of a scheme to defraud; and the interstate wires, telephone wires, so that they are not used to further schemes of fraud.

Let me focus more specifically on the first element, the question of the scheme or artifice to defraud. In this case, the Government has charged the defendant with engaging in a scheme or artifice to defraud the Commonwealth of Massachusetts and its citizens of their right to defendant's honest services as a member of the Massachusetts Legislature. Effective November 18, 1988, the United States Congress determined to make illegal such a scheme or artifice to defraud under the federal wire and mail fraud statutes. Under the mail and wire fraud statutes, persons may be defrauded out of something other than simply money or property. There are certain situations in which one person owes another a duty to perform certain services honestly and faithfully. One such situation exists where a person is elected to a political office, a public office, such as Mr. Woodward was, during the relevant period. A person so elected must fulfill the duties of his office honestly and faithfully.

Now, there are two sub-elements that the Government must prove when they make the charge that there has been a scheme or artifice to defraud by a deprivation of honest services. The Government must prove establish that the duty of honest services has been a violated by a public official such as Mr. Woodward the following two basic sub-elements beyond a reasonable doubt: First, the Government must show that the public official accepted gratuities -- and we use "gratuities" generally as thing of value that we'll define more specifically as we go along -- knowing that the gratuities were offered to influence or otherwise improperly affect his official action. The focus here is on the intent of the defendant to accept a gratuity, actually to influence his official duties, to cause him to depart from his duty to act as a disinterested legislator or legislative decision-maker. We are not here holding the Government to the responsibility to show that a specific official action was, in fact, affected. Your focus is on whether or not there was an intent on the part of the defendant to accept a gratuity actually to influence his official duties. The ultimate concern of this sub-element is, I think, clear. It focuses on whether or not the legislator is exercising his independent judgment in passing on official matters. If the official has been paid by someone or some entity other than the public in connection with his duties, there is a concern that he will make decisions without considering the merits of matter, regardless of the public interest, and thereby deprive the public of honest and faithful services.

The second sub-element that the Government must prove beyond a reasonable doubt is that the public the official intended to deceive the public about his receipt of gratuity. A public official has an affirmative duty to disclose material information to his public employer. The focus here is whether an official fails to disclose a personal interest in a matter over which he has decision-making power with the consequence that

the public is deprived of its right to full disclosure as to the official's potential motivation behind an official act.

Thus, in order to establish a scheme or artifice to defraud of honest services Government must prove beyond a reasonable doubt, first, the receipt of a gratuity by Mr. Woodward with the intent to deprive the public of honest services; and, second, the intent of Mr. Woodward to deceive the public about that conduct.

* * * * *

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 97-CR-441

UNITED STATES

v.

SANTIAGO

JURY INSTRUCTIONS

---

* * * * *

To prove a deprivation of the intangible right to honest services, the government must prove beyond a reasonable doubt that the defendant breached a fiduciary duty, imposed on him by virtue of his employment at the Cook County Treasurer's Office, and as a result obtained private gain. Violation of a fiduciary duty without private gain is not a deprivation of the intangible right to honest services.

* * * * *

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive the

victim or public in order to cause a financial gain to the defendant or to deprive the public of someone's honest services.

* * * * *

All officers and employees of the Cook County Treasurer's Office owed a fiduciary duty to the Cook County Treasurer's Office, the County of Cook and the people of Cook County. When one owes a fiduciary duty to someone, one is required to treat that person with loyalty, care, good faith, fairness and honesty.

When a person owes a fiduciary duty to another person or persons, he can be required to take affirmative acts to protect the best interests of the other people. For example, a fiduciary has an obligation to make appropriate disclosures of material facts and information to others to whom he owes a fiduciary duty where such facts or information might reasonably affect the other person's course of conduct or their ability to pursue their best interests.

* * * * *

A scheme means some plan or course of action intended to deceive another and to deprive another of something of value --such as money, property, or an intangible right--by means of false pretenses, representations, or promises.

Although it is not necessary that the government prove all of the false pretenses, representations, promises, or acts charged in the portion of the indictment describing the scheme, it is essential that one or more of them be proved beyond a reasonable doubt establishing the existence of the scheme to defraud.

* * * * *

The persons who reside within the boundaries of Cook County, Illinois have an intangible right to the loyal and faithful services of public employees and an intangible right to have County business operated fairly, and free of corruption, dishonesty, and fraud.

A scheme to defraud Cook County or the persons who reside within its boundaries of these intangible rights can constitute a scheme to defraud within the meaning of the mail fraud statute.

* * * * *

Defendant Miguel A. Santiago is charged with engaging in a mail fraud scheme to deprive the Cook County Treasurer's Office, and the residents of Cook County, of money, property, and their right to honest services from their public officers and employees.

Defendant Miguel A. Santiago is also charged with knowingly and intentionally embezzling, stealing, obtaining by fraud, or misapplying without authority money valued at $5,000 or more from a local government or agency which receives federal funds.

The defendant has denied that he is guilty of the charges.

* * * * *

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 97-C-O218

UNITED STATES

v.

BOLDEN

JURY INSTRUCTIONS

---

* * * * *

In Counts Four and Five the defendant is charged with violating Title 18, United States Code, Section 1341, which provides, in pertinent part, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud,. . . for the purpose of executing such scheme or artifice or attempting so to do, placed in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . [shall be guilty of an offense against the laws of the United States]."

In Counts Four and Five the defendant is charged with mail fraud. To sustain that charge, the government must provide the following propositions:

Fist, that the defendant knowingly devised or participated in the scheme to defraud as described in the indictment;

Second, that the defendant did so knowingly and with the intent to defraud;

Third, that for the purposes of carrying out the scheme or attempting to do so, the defendant used or caused the use of the United States Mails in the manner charged in the particular count; and,

Fourth, as to Count Five, that the defendant was not entrapped.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, than you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

The mail fraud statute can be violated whether or not any person or entity was actually defrauded by the scheme or there is any loss or damage to the victim of the crime.

The citizens of Chicago and the City of Chicago have an intangible right to the loyal and faithful services of public employees and an intangible right to have the Water Department

of the City of Chicago operated fairly, free from corruption, dishonesty, bribery and fraud.

A scheme to defraud the City of Chicago or the citizens of Chicago of these intangible rights may constitute a scheme to defraud within the meaning of the mail fraud statute.

In paragraph 2 of Counts Four and Five the defendant is charged with participating in a scheme to defraud:

a. The City and the citizens of the City of their right to the loyal, faithful, and honest services of John R. Bolden in the performance of acts related to his public employment as Commissioner of the Department of Water;

b. The City and the citizens of the City of their rights to have the business of the City's Water Department conducted honestly, fairly and impartially, free from corruption, collusion, bias, partiality, dishonesty, breach of fiduciary duty, conflict of interest, bribery, and official misconduct, and in accordance with the laws of the State of Illinois and Chicago Municipal Code;

c. The City of many and property by means of false and fraudulent pretenses, representations and promises and by material omissions.

The government need only prove beyond a reasonable doubt any one of the allegations of paragraph 2 in Counts Four and Five that is, the government must prove the scheme to defraud alleged in 2(a) or 2(b), or 2(c); however, as to any allegations in paragraphs 3 through 11 of Count Four, you cannot find that the basis was that in 2(c), only 2(a) or 2(b).

The indictment you were provided inadvertently failed to omit paragraph 12 of Count Four.

You are being provided with an updated copy of the indictment which omits paragraph 12 of Count Four

Accordingly, as to the jury instruction on page 45, there is no paragraph 12 of Count Four to consider, only paragraphs 3 through 11.

You are to consider only the indictment which I am providing you now, and you are to disregard the previous version of the indictment.

In order to sustain its burden of proof for the charges in Counts Four and Five, the government must show that a single overall scheme alleged in Counts Four and Five of the indictment existed. Proof of separate schemes is not sufficient. In determining whether a single overall scheme has been shown by the evidence in this case, you must determine whether the actions of the defendant constitute some plan or a course of action, a common plan or technique.

Unless the government proves the existence of the single overall scheme, described in Counts Four and Five of the indictment, beyond a reasonable doubt, you must acquit the defendant of Counts Four and Five. Although it is not necessary that the government prove all the acts charged in the portion of the indictment describing the scheme, that is, paragraphs 3-26 of Count Four and paragraph 1 of Count Five, it is essential that one or more of them be proved beyond a reasonable doubt establishing the existence of the scheme to defraud.

The crime of mail fraud requires proof of intent to defraud before the defendant can be convicted. To act with "intent to defraud" within the context of this case means to act knowingly and with the intent to deprive the City of Chicago and its citizens of their rights to John R. Bolden's loyal and faithful services in the performance of acts related to his public employment, and their rights to have him make decisions in his official capacity as Water Commissioner free from corruption, dishonesty, bribery and fraud. Such intent may be determined from all the facts and circumstances surrounding the case.

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive, either to cause the loss of intangible rights, or to cause a financial gain to the defendant.

The phrase "scheme to defraud" may include schemes involving affirmatively false representations, and also schemes involving the omission or concealment of material information, where the omission is intended to induce a false belief on the part of the victim of the scheme, and resulting action to the advantage of the defendant.

If you find that the only scheme proved by the evidence is the Baobab music video, described in Paragraph 13-17 of Count Four and Paragraph 1 of Count Five, you must find the defendant not guilty of Counts Four and Five.

The government must prove that the United States Mail was used to carry out the scheme, or was incidental to an essential part of the scheme.

In order to use or cause the use of the United States Mails, the defendant need not actually intend that use to take place. You must find that the defendant knew such use would

actually occur, or that he knew that it would occur in the ordinary course of business, or that he knew facts from which that use could reasonably have been foreseen.

Although an item mailed need not itself contain a fraudulent representation or promise or a request for money, it must further or attempt to further the scheme.

Each separate use of the mail in furtherance of the scheme to defraud constitutes a separate offense.

* * * * *

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 97-0335 (RMU)

UNITED STATES

v.

ESPY

JURY INSTRUCTIONS

Ladies and Gentlemen, it is now my responsibility to instruct you the law that should control your deliberations in this case. After these instructions, Counsel will deliver their closing arguments. Let me begin by defining the functions of the various participants in the trial.

* * * * *

COUNTS ONE THROUGH EIGHT – THE ESSENTIAL ELEMENTS OF MAIL AND WIRE FRAUD

Counts One (1) through Eight (8) of the indictment charge Mr. Espy with what is called mail or wire fraud. To sustain its burden of proof as to these counts, the Government must prove the following three (3) essential elements beyond a reasonable doubt:

One: That Mr. Espy devised or participated in a scheme to deprive the United States of its right to his honest services, or to obtain money or property through false representations or promises; and

Two: That Mr. Espy did so knowingly and wilfully, with the specific intent to defraud; and

Three: That, in furtherance of this scheme, Mr. Espy used the mails or interstate wires, or caused the mails or interstate wires to be used as specified in the corresponding count in the indictment.

MAIL AND WIRE FRAUD -- THE FIRST ELEMENT

In order to prove the first element of each of the mail and wire fraud counts, the government must prove, beyond a reasonable doubt, that Mr. Espy devised or participated in a scheme to either (1) deprive the United States of its intangible right to his honest services, or (2) obtain money or property through false representations or promises.

"SCHEME OR ARTIFICE" -- DEFINED

The phrase "scheme or artifice" as used in conjunction with both deprivation of honest services and obtaining the jeep, means any deliberate plan of action or course of conduct by which someone specifically intends to deceive or to cheat another or by which someone specifically intends to deprive another of something of value.

A "scheme or artifice" includes a scheme to deprive another of tangible items, such as money or property, or of intangible rights, such as the right of honest services.

It is not necessary for the government to prove that Mr. Espy was actually successful in depriving the public of its right to his honest services. It is not necessary for the government to prove that anyone lost any money or property as a result of the scheme or plan. An unsuccessful scheme or plan to deprive another of an intangible right is just as illegal as a scheme or plan that is ultimately successful.

UNANIMITY

The Government is proceeding under two theories with respect to counts one through eight: That Mr. Espy devised or participated in a scheme either (1) to deprive the United States of its intangible right to his honest services, or (2) to obtain money or property through false representations or promises.

In order to convict Mr. Espy on any of these counts, you, the jury, must unanimously find that the Government has proven beyond a reasonable doubt the elements associated with one or both of these theories. It is not enough that some of you may believe that the Government has met its burden with respect to the first theory and not the second, while others believe that the Government has met its burden with respect to the second theory but not the first. All twelve of you must agree that the Government has met its burden with respect to the same theory or theories.

"DEPRIVATION OF HONEST SERVICES" - DEFINED

Two of the ways that a public official can steal his honest services from his public employer are (1) the official can be influenced or improperly affected in the performance of his duties, or (2) the official can fail to disclosed a conflict of interest resulting in personal gain.

With respect to the first way, the Government would have to prove beyond a reasonable doubt that Mr. Espy accepted an unlawful gratuity with the specific intent to be influenced in the performance of official acts. As to the second way, the Government can show a deprivation of honest services by proving beyond a reasonable doubt that Mr. Espy intentionally failed to disclose a conflict of interest that resulted in personal gain.

The government may show such a failure to disclose a conflict of interest resulting in personal gain by demonstrating that Mr. Espy either (1) intentionally failed to comply with the requirements of the financial disclosure form, SF-278, with respect to the gifts received from persons or entities over which he had decision making power, or (2) failed to comply with the required ethical regulations by intentionally receiving anything of value from persons or entities over which he had decision making power and then failing to disclose such a conflict of interest to his public employer.

UNANIMITY

The Government is proceeding under two theories with respect to the counts charging "deprivation of honest services"; That Mr. Espy stole his honest services by either (1) being influenced or improperly affected in the performance of his duties, or (2) failing to disclose a conflict of interest resulting in personal gain.

In order to convict Mr. Espy on any count of deprivation of honest services, you, the jury, must unanimously find that the Government has proven beyond a reasonable doubt the elements associated with one or both of these theories. It is not enough that some of you may believe that the government has met its burden with respect to the first theory and not the

second, while others believe that the Government has met its burden with respect to the second theory but not the first. All twelve of you must agree that the Government has met its burden with respect to the same theory or theories.

"ANY SCHEME OR ARTIFICE TO OBTAIN MONEY OR PROPERTY BY MEANS OF FALSE OR FRAUDULENT PRETENSES, REPRESENTATIONS, OR PROMISES" - DEFINED

The phrase "any scheme or artifice . . . for obtaining money or property" means any deliberate plan of action or course or conduct by which someone specifically intends to deceive or to cheat another or by which someone specifically intends to deprive another of something of value.

The term "false or fraudulent pretenses, representations, or promises" means a statement or an assertion which concerns a material or important fact or a material or important aspect of the matter in question and that was either known to be untrue at the time that it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with the specific intent to defraud. A material fact is a fact that would be of importance to a reasonable person in making a decision about a particular matter or transaction.

The term "false or fraudulent pretenses, representations, or promises" includes actual, direct false statements and includes the knowing concealment of facts that are material or important to the matter in question and that were made or used with the specific intent to defraud.

Again, it is not necessary for the Government to prove that Mr. Espy was actually successful in defrauding anyone. It

is not necessary for the Government to provide that anyone lost any money or property as a result of the scheme or plan. An unsuccessful scheme or plan to obtain money or property by false or fraudulent pretenses is just as illegal as a scheme or plan that is ultimately successful.

MAIL AND WIRE FRAUD - THE SECOND ELEMENT: "INTENT TO DEFRAUD" - DEFINED

In order to prove the second element of a mail or wire fraud count, the Government must prove beyond a reasonable doubt that Mr. Espy devised or participated in a scheme knowingly and wilfully with the specific intent to defraud. "Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Wilfully" means to act intentionally and purposely, rather than accidentally.

To act with an "intent to defraud" means to act with the specific intention or purpose of deceiving or cheating. An official's intentional violation of his duty to disclose can provide the requisite deceit.

An intent to defraud is accompanied, ordinarily, by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause some loss to some person. Again, Mr. Espy's gain and the loss to some other person may be in the form of a tangible item, such as money or property, or in the form of an intangible right, such as the right to honest services.

MAIL AND WIRE FRAUD - THE THIRD ELEMENT: USE OF WIRES IN INTERSTATE COMMERCE OR USE OF THE MAILS - DEFINED

The third element that the Government must establish is that Mr. Espy transmitted, or caused the transmission of, any writing, signal, or sound by means of a wire communication in interstate commerce, or used the mails or caused the mails to be used to further his scheme.

The phrase "transmit by means of wire communication in interstate commerce" means to send from one state to another by means of a telephone line and includes a telephone conversation or facsimile transmission by a person in one state with or to a person in another state.

Counts one through four allege a use of a wire communication in interstate commerce; counts five through eight allege a use of the mails.

The Government need not prove that Mr. Espy personally used the wires or mailed anything as long as the use of the wires or mail was a reasonably foreseeable part of the scheme in which he participated. The Government must prove beyond a reasonable doubt, however, that a transmission by a wire communication was, or that the mails were, in fact, used in some manner to further, or to advance, or to carry out the scheme to defraud. The use of the wires or mail to further the fraudulent scheme need only be incidental; however, the scheme's completion or prevention of its detection must have depended in some way on the charged mailing or wire transmission.

It is not necessary for the Government to prove that the information transmitted by means of the wires or mails was false

or fraudulent or contained any false or fraudulent pretense, representation, or promise, or contained any request for money or thing of value.

The Government must prove beyond a reasonable doubt, however, that the use of the wire communication or the use of the mails furthered, or advanced, or carried out, in some way the scheme or plan to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises.

EACH USE OF THE MAILS AND EACH TRANSMISSION BY WIRE COMMUNICATION

Each use of the mails or each transmission by wire communication to advance, or to further, or to carry out the scheme or plan to defraud may be a separate violation of the mail or wire fraud statutes.

* * * * *

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

No. 99-218

In the Supreme Court of the United States

VICKI LOPEZ-LUKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1728

QUESTIONS PRESENTED

1. Whether, in instructing the jury on the offense of "honest services" mail fraud, see 18 U.S.C. 1341 and 1346, the district court erred by failing to define the phrases "honest services" and "official capacity."

2. Whether a government official who makes false statements to the press about her romantic involvements may be found to have thereby deprived her constituents of their right to her "honest services," in violation of the federal mail fraud statute.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Dunn v. *United States*, 284 U.S. 390 (1932)	14
Tanner v. *United States*, 483 U.S. 107 (1987)	14
United States v. *Bolden*, No. 97-CR-0218 (N.D. Ill. Jan. 1, 1998)	11
United States v. *Czeck*, 671 F.2d 1195 (8th Cir. 1982)	10
United States v. *Johnson*, 575 F.2d 1347 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979)	10
United States v. *Lignarolo*, 770 F.2d 971 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986)	10
United States v. *Marino*, 639 F.2d 882 (2d Cir.), cert. denied, 454 U.S. 825 (1981)	10
United States v. *Powell*, 469 U.S. 57 (1984)	14
United States v. *Santiago*, No. 97-CR-441 (N.D. Ill. Jan. 27, 1999)	11
United States v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996)	11
United States v. *Starrett*, 55 F.3d 1525 (11th Cir. 1995), cert. denied, 517 U.S. 1111, 517 U.S. 1127 (1996)	10
United States v. *Thetford*, 676 F.2d 170 (5th Cir. 1982), cert. denied, 459 U.S. 1148 (1983)	10
United States v. *Woodward*, No. 95CR10234-DPW (D. Mass. Feb. 7, 1997)	11

Statutes and rule:

	Page
Travel Act, 18 U.S.C. 1952(a)(3)	2
18 U.S.C. 666(a)(1)(B)	2
18 U.S.C. 1341	2, 5, 10
18 U.S.C. 1346	2, 5, 10
Fed. R. Evid. 606(b)	14

In the Supreme Court of the United States

No. 99-218

VICKI LOPEZ-LUKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam judgment of the court of appeals (Pet. App. 1a-2a) is unreported, but the decision is noted at 170 F.3d 186 (Table). The opinion of the court of appeals on denial of rehearing (Pet. App. 3a-10a) is unreported. Two earlier opinions of the court of appeals in this case are reported at 102 F.3d 1164 and 113 F.3d 1187.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1999. A petition for rehearing was denied on May 5, 1999 (Pet. App. 3a-10a). The petition for a writ of certiorari was filed on August 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341 and 1346.[1] She was sentenced to 27 months' imprisonment. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1a-2a.

1. In August 1990, the Board of County Commissioners (BOCC) of Lee County, Florida, entered into a $197 million contract with Ogden Martin for the construction of an incinerator in Lee County. The construction of the incinerator was opposed by Waste Management Resources, which had a contract with Lee County to handle all of the County's landfill needs. During the summer of 1990, petitioner successfully ran for a seat on the BOCC as an anti-incinerator candidate. During the campaign, she began a secret romantic relationship with Bruce Strayhorn, Waste Management's lobbyist. At her first BOCC meeting, petitioner voiced her opposition to the incinerator. After a newspaper published an article exposing petitioner's relationship with Strayhorn, the two ended the relationship. Gov't C.A. Br. 3-5.

Ogden Martin subsequently hired co-defendant Sylvester Lukis as a lobbyist. Lukis also worked as a consultant for bond underwriting firm Goldman Sachs, which likewise was seeking to do business with Lee County. Petitioner and Lukis (who would marry after

---

[1] The jury acquitted petitioner on one count of accepting a bribe concerning programs receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(B), and on eight counts of using a facility in interstate commerce to carry on an unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952(a)(3). See Pet. 3 & n.1; Gov't C.A. Br. 1-3.

the events in this case) began a romantic relationship that they kept hidden from Ogden Martin, Goldman Sachs, and the public. The two spoke to each other frequently over petitioner's county-issued cellular telephone. After the results of a County audit of petitioner's use of the telephone were published in a newspaper, Lukis told petitioner that he would pay the telephone bill. To avoid exposing their relationship, he funneled the money to petitioner through one of her friends, falsely noting on the check that it was for a "Lee reception." Lukis gave petitioner additional sums of money on several occasions, each time funneling the money through petitioner's friend and several times annotating the check with a false purpose for its issue. Petitioner did not report the money she received from Lukis as income on her 1991 financial disclosure form or her 1991 income tax return. Gov't C.A. Br. 5-8, 17.

In the spring of 1991, Goldman Sachs sought to obtain bond underwriting work from Lee County. Petitioner arranged for Goldman Sachs representatives to meet with County officials. After the County Administrator told Lukis that Goldman Sachs could not be brought in on the incinerator project, petitioner approached the County Administrator, telling her that she was not being fair to Goldman Sachs and that the County Commissioners should have more input in the selection of bankers for the county. Petitioner then proposed to the BOCC that it reexamine the County's method of selecting bond underwriters and advocated a method of selection proposed by Goldman Sachs. Petitioner and other BOCC members proceeded to create a Bond Selection Committee to wrest control over the selection of bond underwriters from the County Administrator. A month later, the BOCC, including petitioner, voted to proceed with the construction of the

incinerator. Petitioner sent the Financial Advisor a document prepared by Goldman Sachs that was critical of a provision contained in the Financial Advisor's proposed questionnaire for use in selecting bond underwriters for the County. The Financial Advisor subsequently removed the provision from the questionnaire. Petitioner later took additional steps to help Goldman Sachs obtain county business. Gov't C.A. Br. 8-12, 15-17.

In September 1991, petitioner responded to a list of questions submitted by a reporter investigating her relationship with Lukis. She falsely asserted, *inter alia*, that she did not recall when she had met Lukis, did not know what his relationship was with Goldman Sachs, and did not know when she had become aware of his relationship with Ogden Martin. Gov't C.A. Br. 12-13.

Around April 1992, petitioner and Lukis broke off their relationship, and petitioner resumed her romantic relationship with Strayhorn. A private investigator hired by Lukis videotaped Strayhorn in a romantic encounter with an anti-incinerator candidate for the BOCC, Susan Anthony. After learning about the videotape, petitioner told Strayhorn that if Anthony did not drop out of the BOCC race by the end of that week, petitioner would release the tapes to the media. Anthony refused to drop out of the BOCC race, and petitioner arranged for the videotape to be distributed to newspapers and television stations in the area. Anthony later reported petitioner's extortionate threats to the State Attorney's Office. In a subsequent radio interview, petitioner lied about her involvement with the videotape, alleging that the blackmail allegations had been precipitated by petitioner's vote to put the Waste

Management landfill contract out for bid. Gov't C.A. Br. 17-21.

2. The government's theory of prosecution on the mail fraud count was that petitioner and Lukis had engaged in a fraudulent scheme to deprive the citizens of Lee County of their intangible right to petitioner's honest services as a Lee County Commissioner, and that in furtherance of that scheme they had used the United States mail. See Pet. App. 18a.[2] The indictment alleged that it was part of the fraudulent scheme that petitioner would agree to accept pecuniary benefits from Lukis to influence her performance as a Lee County Commissioner (*id.* at 19a); that petitioner and Lukis would conceal their "monetary and intimate relationship" from the citizens of Lee County (*ibid.*); and that petitioner and Lukis would use the videotape of Anthony and Strayhorn to force Anthony to withdraw as a BOCC candidate, thereby affecting the composition of the BOCC (*id.* at 20a).

3. In its instructions on the mail fraud count, the district court explained to the jury that, in order to

---

[2] The federal mail fraud statute establishes criminal penalties for any person who, "having devised or intending to devise any scheme or artifice to defraud, * * * places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing." 18 U.S.C. 1341. The statute further provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

convict, it must find beyond a reasonable doubt that "the defendants knowingly and willfully devised a scheme to defraud the citizens of Lee County of their intangible right to [petitioner's] honest services in her official capacity." 4/15/97 Tr. 2190 (Pet. App. 45a). The court defined the word "scheme" as a "plan or course of action intended to deceive others and to [deprive] by false and fraudulent pretenses, representations or promises, the citizens of Lee County of their intangible right of honest services." *Ibid.* The court further instructed that, in order to find the requisite intent to commit "honest services" fraud, the jury must conclude that petitioner "solicited or accepted benefits with the intention of being influenced in her official duties." 4/15/97 Tr. 2191 (Pet. App. 46a). The district court also instructed the jury that

> [t]he defendants have [pled] not guilty to the charges of the indictment and have maintained their not guilty pleas throughout this trial. They claim that various of the acts described here during the course of the trial were made as part of their ongoing romantic relationship, which if true would mean it would constitute a complete defense.

4/15/97 Tr. 2176.

The district court did not give petitioner's proposed instruction on "honest services" mail fraud, which read in pertinent part:

> To "defraud the citizens of Lee County of their intangible right to honest services" means that Mr. and Mrs. Lukis must have devised a scheme to influence Mrs. Lukis's performance of her official functions, so that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of

> the Lee County Board of County Commissioners. In particular, in order to return a guilty verdict on this count, you must first find that the prosecution has proven beyond a reasonable doubt that Mr. and Mrs. Lukis devised a scheme whereby Mrs. Lukis would solicit, and Mr. Lukis would give, financial payments based on an understanding that Mrs. Lukis's actions as a County Commissioner would be influenced by such payments.

Pet. App. 27a.

The court also declined to give the supplemental instruction later proposed by petitioner, which read in pertinent part:

> To "defraud the citizens of Lee County of their intangible right to honest services" means that Lukis and Lopez-Lukis must have devised a scheme to influence Lopez-Lukis's performance of her official duties as Lee County Commissioner through the making of illegitimate payments to her, such that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners.

Pet. App. 30a.

4. On appeal, petitioner contended that the district court's mail fraud instructions were deficient in that they contained no definition of petitioner's "honest services" in her "official capacity." Petitioner argued that the instructions given by the district court improperly permitted the jury to convict her of mail fraud if it found that she had engaged in noncriminal forms of dishonesty, such as lying to the press about her relationship with Lukis. See Pet. C.A. Br. 25-34. The government contended that the instructions adequately

communicated the elements of the mail fraud offense, explaining that "[b]ecause the instructions required the jury to find that the scheme charged in the indictment was intended to influence her in her official duties, the jury could not have convicted [petitioner] for simply lying to the press or failing to disclose her relationship with Lukis." Gov't C.A. Br. 30. The court of appeals affirmed without opinion. Pet. App. 1a-2a.

5. Petitioner filed a petition for rehearing and suggestion for rehearing en banc. Petitioner asserted that "[i]t is absolutely clear that the district court's failure to define the phrases 'honest services' and 'official capacity,' which the prosecutor inappropriately exploited during summation, caused the jury to convict [petitioner] of lying to the media." Pet. for Reh. 9. She argued that "[b]y issuing a per curiam affirmance, the panel apparently rejected out of hand the legal analyses that have caused other courts of appeals to limit 'honest services' to conduct that deprives the public of its right to have decisions regarding matters of public concern made in a disinterested, honest fashion." *Id.* at 11. Petitioner also contended that the panel had acted improperly by deciding the case in an unpublished per curiam order because "[t]he question of whether a public official's lying to the news media constitutes 'honest services' mail fraud is a substantial legal issue that would benefit from an opinion by [the court of appeals]." *Id.* at 13.

The court of appeals denied rehearing and rehearing en banc. Pet. App. 3a-10a. The court stated that

> [t]he flaw in [petitioner's] petition for rehearing with respect to this issue lies in the petition's unwarranted assumption that the panel decided that a public official could be convicted of "honest services

> mail fraud" based upon dishonest statements to the media and the public about a private romantic affair. The panel did not decide that.

Id. at 5a-6a. Rather, the court explained, the government's theory of prosecution was that petitioner had engaged in a scheme to defraud by "accept[ing] benefits to influence her performance of *official* acts as a member of the Board of County Commissioners." *Id.* at 6a. The court stated that "[t]he jury instructions emphasized that the government must prove that [petitioner] solicited or accepted benefits with the intention of being influenced in her *official* duties," and that "[t]here was ample evidence to support the jury's verdict that [petitioner] accepted benefits to influence her in her *official* actions." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 15-21) that the district court's jury instructions were defective because they did not define the terms "honest services" and "official capacity." That claim lacks merit and does not warrant this Court's review.

The thrust of petitioner's proposed instructions was that she could be convicted of "honest services" mail fraud only if she solicited or accepted payments "to influence [her] performance of her official functions, so that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners." Pet. App. 27a; see also *id.* at 30a. The district court's instructions to the jury were substantially equivalent, requiring for conviction that the jury find that petitioner "solicited or accepted benefits with the intention of being influenced in her official duties." 4/15/97 Tr. 2191 (Pet. App. 46a). Indeed, when

petitioner proposed her supplemental instruction, the district court responded: "Isn't that in here already adequately?" Pet. App. 34a; see also *id.* at 35a ("I think [the charge] covers it."). A district court has wide discretion in formulating its instructions and is not bound by the wording of defense-authored instructions even if they accurately state the law. See, *e.g.*, *United States* v. *Starrett*, 55 F.3d 1525, 1551 (11th Cir. 1995), cert. denied, 517 U.S. 1111 and 517 U.S. 1127 (1996); *United States* v. *Thetford*, 676 F.2d 170, 178 (5th Cir. 1982), cert. denied, 459 U.S. 1148 (1983); *United States* v. *Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982). In the present case, the district court's determination that the instructions as given adequately set forth the elements of "honest services" mail fraud, and that petitioner's proposed instructions were accordingly unnecessary, was well within the court's discretion.

Petitioner contends (Pet. 15-16) that the instructions given to the jury were defective because they did not specifically define the term "official capacity." The phrase "official capacity," however, is not used in 18 U.S.C. 1341 or 1346, and it is not a "specialized legal term[]" (Pet. 2) that requires additional definition in every case. While a court might permissibly elect to amplify that term, the district court did not abuse its discretion here in failing to provide a specific definition of it. See *United States* v. *Lignarolo*, 770 F.2d 971, 980 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986); see also *United States* v. *Marino*, 639 F.2d 882, 888 (2d Cir), cert. denied, 454 U.S. 825 (1981); *United States* v. *Johnson*, 575 F.2d 1347, 1357-1358 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979). That is especially so since the court also made clear that the defendants "claim that various of the acts described here during the course of the trial were made as part of their ongoing

romantic relationship, which if true would mean it would constitute a complete defense." 4/15/97 Tr. 2176.

Petitioner's reliance (Pet. 16-17) on *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), is misplaced. In *Sawyer*, the indictment charged that the defendant, a lobbyist, engaged in "honest services" mail and wire fraud through a scheme intended to cause state legislators to violate their duties to the public. To establish the scheme, the government sought to prove that the defendant intentionally violated or caused the legislators to violate the Massachusetts gift statute and the Massachusetts gratuity statute. The court's instructions allowed the jury to find an intent to defraud from the intent to violate the gift statute. The court of appeals held that this was error, explaining that "to prove the intent to commit honest services fraud, the jury had to find that [the defendant] *intended to influence or otherwise improperly affect the official's performance of duties*, not merely that he intended to violate the state statute." *Id.* at 729. Here, by contrast, the district court made clear that petitioner could be convicted on the mail fraud count only if she "solicited or accepted benefits with the intention of being influenced in her official duties." 4/15/97 Tr. 2191 (Pet. App. 46a).

Petitioner's reliance (Pet. 17-20) on the instructions given in *United States* v. *Bolden*, No. 97-CR-0218 (N.D. Ill. Jan. 1, 1998); *United States* v. *Woodward*, No. 95CR10234-DPW (D. Mass. Feb. 7, 1997); and *United States* v. *Santiago*, No. 97-CR-441 (N.D. Ill. Jan. 27, 1999), is also misplaced. The instructions given by the district courts in those cases (see Pet. App. 76a-89a) were indeed more elaborate than the instructions given here. But the fact that other courts have chosen to give more extensive instructions does not mean that those

courts would regard the instructions given here as legally inadequate.[3]

2. Petitioner also contends (Pet. 22-26) that review by this Court is warranted on the question whether a conviction for "honest services" mail fraud can be

---

[3] Petitioner claims (Pet. 10) that the government stated in its closing argument that the jury could convict her of "honest services" mail fraud simply because she lied to the press about personal matters. Petitioner, however, made no contemporaneous objection to any of government counsel's purportedly improper statements, and none of those comments rises to the level of plain error. The government repeatedly stressed in its summation that its theory of prosecution was that petitioner had accepted money to influence her actions in connection with official matters before the BOCC. See, *e.g.*, 4/15/97 Tr. 2113 ("I'm talking about her actions in her official capacity as a County Commissioner, changing her vote on the incinerator project, lying to an entire community * * * about the reasons for her official actions."); *id.* at 2114 ("The official actions of Ms. [Lopez-Lukis] are what we're concerned with"); *ibid.* ("The things she did in the scope of her official capacity is what we ask you to focus on."); *id.* at 2121 ("The unavoidable facts [are] that Sylvester Lukis paid her, and she acted for Ogden Martin and Goldman Sachs, exposing their views, making their introductions, providing them information, utilizing the information which they gave her, and voting for their interests."). The government also argued to the jury that petitioner attempted to conceal her bribery scheme by lying to the press and others, and it made clear that petitioner's "official capacity" included more than "votes." See Pet. App. 47a, 48a, 50a. But the government's overall argument did not contend that the jury could convict petitioner on the mail fraud count for lies alone without also finding that she accepted payments from Lukis with the intention of being influenced in her official acts as a County Commissioner. See *id.* at 6a (court of appeals observes on denial of rehearing that the allegation that petitioner "accepted benefits to influence her performance of *official* acts as a member of the Board of County Commissioners * * * was the government's theory of prosecution and the clear meaning of the government's argument to the jury").

predicated on a public official's lies to the press about his private life. She asserts (Pet. 22) that "[t]he worthiness of this issue for review by this Court is made plain by the fact that the summary affirmance of petitioner's conviction could subject virtually every local, state, and federal office holder in the states of the Eleventh Circuit to criminal prosecution for misleading or incomplete statements to the media."

The government's brief in the court of appeals, however, did not contend that petitioner could properly be convicted of mail fraud based on her false denials of a romantic relationship. Rather, the government argued that "[b]ecause the instructions required the jury to find that the scheme charged in the indictment was intended to influence her in her official duties, the jury could not have convicted [petitioner] for simply lying to the press or failing to disclose her relationship with Lukis." Gov't C.A. Br. 30. More importantly, in its opinion on denial of rehearing, the court of appeals specifically disavowed the holding attributed to it by petitioner, explaining that

> [t]he flaw in [petitioner's] petition for rehearing with respect to this issue lies in the petition's unwarranted assumption that the panel decided that a public official could be convicted of "honest services mail fraud" based upon dishonest statements to the media and the public about a private romantic affair. The panel did not decide that.

Pet. App. 5a-6a. The question whether a public official deprives his constituents of "honest services" by making false statements to the press about his private

life is therefore not a basis on which the appellate affirmance turned.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

OCTOBER 1999

---

[4] Neither petitioner's acquittal on the bribery and Travel Act counts (which alleged bribery as the underlying "unlawful activity"), nor the post-trial press interviews with jurors on which she relies (see Pet. 11, 26), advance petitioner's claim that the jury convicted her of mail fraud for lying to the press about her personal life, rather than for accepting money to influence her performance of official duties. Even assuming that the verdicts were inconsistent, it is well settled that a defendant convicted by a jury on one count may not attack the conviction on the ground it was inconsistent with the jury's verdict of acquittal on another count. See *United States* v. *Powell*, 469 U.S. 57, 62 (1984). Rather, where inconsistent verdicts have been reached, "[t]he most that can be said * * * is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* at 63 (quoting *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)). With respect to the post-trial juror interviews, Federal Rule of Evidence 606(b) adopts the common-law rule that, except in cases where an extraneous influence is alleged to have affected the jury, juror testimony is inadmissible to impeach a verdict. See *Tanner* v. *United States*, 483 U.S. 107, 117 (1987).

Supreme Court, U.S.
FILED
OCT 13 1999
OFFICE OF THE CLERK

No. 99-218

IN THE
SUPREME COURT OF THE UNITED STATES

VICKI LOPEZ-LUKIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

Carter G. Phillips*
Thomas C. Green
Bradford A. Berenson
Griffith L. Green
Andrew E. Weis
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

*** Counsel of Record**

October 13, 1999

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 3

I. THE COUNT ONE JURY INSTRUCTIONS DID NOT DEFINE MRS. LUKIS'S "HONEST SERVICES IN HER OFFICIAL CAPACITY" OR PRECLUDE THE JURY FROM CONVICTING HER FOR LYING TO THE PRESS ABOUT HER AFFAIR WITH MR. LUKIS 3

II. NEITHER THE GOVERNMENT'S BRIEF NOR THE ELEVENTH CIRCUIT'S UNPUBLISHED PER CURIAM AFFIRMANCE INSULATES THE IMPORTANT INSTRUCTIONAL CONFLICT IN THE LOWER COURTS FROM REVIEW 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page

United States v. *Anderton*,
629 F.2d 1044 (5th Cir. 1980) 6

United States v. *Bloom*,
149 F.3d 649 (7th Cir. 1998) 10

United States v. *Grigsby*,
111 F.3d 806 (11th Cir. 1997) 6

United States v. *Lively*,
803 F.2d 1124 (11th Cir. 1986) 7

United States v. *Lopez-Lukis*,
102 F.3d 1164 (11th Cir. 1997) 7

United States v. *Morris*,
20 F.3d 1111 (11th Cir. 1994) 6,7

United States v. *Sawyer*,
85 F.3d 713 (1st Cir. 1996) 9

OTHER AUTHORITY

First Circuit Pattern Jury Instructions (Criminal Cases) (1998) 9

REPLY BRIEF OF PETITIONER

In its opposition, respondent does not dispute that the questions presented are important issues of substantive federal criminal law. Nor does it dispute that the "honest services" fraud instructions given in this case differ considerably from those routinely given by district courts in other circuits. Indeed, the government affirmatively acknowledges that those other courts give "more extensive instructions" concerning the meaning of a public official's honest services than those upheld by the court of appeals in this case. Resp. Br. 12. Significantly, the government nowhere contends that the questions presented are, as a general matter, unworthy of review.

Instead, the opposition is based solely on the claim that the questions identified in the petition are not actually presented in the case.[1] Respondent argues that the jury instructions in this case *did* adequately define the statutorily-required object of an honest services fraud scheme under 18 U.S.C. § 1346 and did *not* permit Mrs. Lukis to be convicted on the erroneous basis described in the petition (and expressly cited by two separate jurors as the actual basis of their verdict). See Resp. Br. 9-12; Pet. 11. It further contends that the government did not argue before the Eleventh Circuit, and the Eleventh Circuit did not hold, that a public official could properly be convicted on that erroneous basis, *i.e.*, for telling lies about her private life unconnected to any actual corruption of her governmental decisions or actions. Resp. Br. 13-14.

These arguments are either incorrect, beside the point, or both. The first argument is demonstrably untrue, as an examination of the Count One jury instructions readily reveals. The jury instructions in this case *contained no definition at all*

---

[1] Petitioner will not address respondent's recitation of the facts, as it is not germane to the issue before the Court. Petitioner notes for the record, however, that respondent's account is tendentious, incomplete, and misleading.

of Mrs. Lukis's "honest services in her official capacity." Nor were they otherwise sufficient to advise a reasonable jury of the line between public corruption and mere lies by a public official. No fair evaluation of the instructions could yield the conclusion, first stated by the district court and subsequently relied on by the court of appeals and now by respondent, that the question whether a guilty verdict could be based on Mrs. Lukis's lies to the press about her love affair with Mr. Lukis was covered "'in here already adequately.'" Resp. Br. 10 (quoting Pet. App. 34a).

The government's second argument is true but irrelevant. We have never contended that the government was forthright in defending the actual basis for the verdict or that the Eleventh Circuit was forthright in affirming it. Pet. 20. It is, on the contrary, the court of appeals' refusal to grapple honestly with the issues in this case that lends special urgency to the request for this Court's intervention. The judgment of the court of appeals needs to be reviewed not simply because it approved a legally defective instruction that would not have been affirmed in other circuits, but also because the court of appeals refused to admit what it was really doing, even -- or perhaps especially -- after it was taken to task for trying to duck the issue by issuing a mute, one-word opinion. Certiorari is necessary precisely to eliminate the important instructional disuniformity that the court of appeals attempted to conceal.

Unless one accepts blindly the pretextual reasoning offered by the Eleventh Circuit in an effort to affirm Mrs. Lukis's conviction while frustrating the prospects for further review, the issues identified in the petition are squarely presented by this case. As such, their worthiness of review is uncontested, and this Court should grant certiorari.

ARGUMENT

I. THE COUNT ONE JURY INSTRUCTIONS DID NOT DEFINE MRS. LUKIS'S "HONEST SERVICES IN HER OFFICIAL CAPACITY" OR PRECLUDE THE JURY FROM CONVICTING HER FOR LYING TO THE PRESS ABOUT HER AFFAIR WITH MR. LUKIS.

Respondent urges that certiorari should be denied because the Count One instructions given by the district court "were substantially equivalent" to the instructions proffered by the defense and "adequately set forth the elements of 'honest services' mail fraud." Resp. Br. 9, 10. That is simply not so.

The critical feature of each written instruction submitted by the defense, as well as each subsequent oral plea for elaboration, was to define for the jury the meaning of a scheme to deprive the public of Mrs. Lukis's "honest services." Pet App. 27a, 30a, 33a-35a. Specifically, the defense instructions sought to advise the jury that the scheme charged in Count One and made criminal by 18 U.S.C. § 1346 involved the corruption of Mrs. Lukis's "honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners." *Id.* at 27a, 30a. This was the critical verbal formulation separating garden-variety dishonesty by a public official from felony mail fraud. Without it, a proper understanding of the charge in Count One was impossible: the jury was left free to credit the prosecution's erroneous theory in closing and find Mrs. Lukis guilty, as the jurors later confirmed they did, because "'she lied to some reporter based on something she mailed.'" *Id.* at 58a.[2]

---

[2] Respondent's attempt to rehabilitate the prosecutor's closing argument, while not critical to the Court's consideration of certiorari, is so misleading as to require a brief response. Respondent quotes portions of the summation that

(continued...)

There is simply no way to dispute or obscure the central fact that *the jury instructions on Count One contain no definition whatsoever of the required object of the scheme: the deprivation of Mrs. Lukis's honest services in her official capacity*. Pet. App. 18a. The critical nature of this instructional gap is apparent when one considers that the phrase "honest services" is used at least eight times in those instructions. See *Id.* at 44a-46a. Moreover, in explaining what scheme the prosecution was obliged to prove, the instructions referred the jury back to the terms of the indictment, while expressly *liberating* the jury from having to make the crucial finding: the jury was instructed that "[i]t is not necessary that the Government prove all the details alleged in the indictment concerning the precise nature and purpose of the scheme." *Id.* at 46a. Thus, the jury was left free to assume that it could convict Mrs. Lukis even if it concluded that the *only* legally essential ingredient "concerning the precise nature and purpose of the scheme" -- the bribery allegation -- was false. To make matters worse, the instructions told the jury that the videotape incident could be considered "as evidence of the alleged honest services mail fraud scheme," *id.*, which, absent a definition of

---

[2] (...continued)
were properly addressed to the issue of bribery, which was explicitly charged in the counts of the indictment *other* than Count One. *See* Resp. Br. 12 n.3. What respondent fails to mention is that ***each and every time the prosecutor discussed Count One or invoked the concept of honest services, he did so referring only to the lies Mrs. Lukis told the press and the public about her love life and the various events, such as the videotape incident, that were related to it.*** *See, e.g.*, Pet. App. 47a ("The charge is depriving the citizens of her honest services. . . . The citizens of Lee County deserved her honest voice. They deserved honest actions, and what they got was concealment and lies for nearly her entire term."); *id.* at 50a ("[T]he honest thing, the proper thing was to disclose the relationship before the first vote, before the first official act. . . . That disclosure, that revealing of the relationship, that would have been honest services."); *id.* ("They had lied repeatedly to promote their own interests . . . and that dishonesty, that deprivation of honest services should stop here.").

"honest services," might reasonably be construed as an endorsement of the notion that lies told about the videotape incident could form the basis of a conviction on Count One.

Respondent echoes the court of appeals in arguing that the instructions were adequate because they required the jury to find "that petitioner 'solicited or accepted benefits with the intention of being influenced in her official duties.'" Resp. Br. 9-10 (quoting Pet. App. 46a). This sentence was not a definition of "honest services" or the required object of the mail fraud scheme; instead, it was buried in the instructions as a small portion of a subsidiary part of the definition of "false or fraudulent" statement, an element of the alleged scheme the jury almost certainly took for granted in light of Mrs. Lukis's admissions that she had lied to the reporter and others about her relationship with Mr. Lukis. More importantly, however, no matter how many times the court of appeals or respondent repeats or underlines the words "official duties" in this sentence, it is impossible to obscure the fact that this sentence not only fails to save the Count One instruction, it highlights its precise inadequacy: the critical question the instructions never answer, which gives rise to the legal issue presented in the petition, is *what did Mrs. Lukis's "official duties" include for purposes of criminal liability under 18 U.S.C. § 1346*?

The instructions nowhere define "official duties," and that term, taken by itself, adds nothing to the undefined term "honest services in her official capacity," which is used elsewhere in the instructions to describe the required object of the fraud scheme. Pet. App. 45a. Neither term helps the jury understand the critical legal distinction reflected in the proposed instructions Mrs. Lukis tendered to the court: that Mrs. Lukis's "honest services" or "official duties" for purposes of the fraud charge could include only her judgments and actions relating to the official business of the County and not such things as her overall ethics or morals, campaign-related conduct, or the

honesty of her statements to the public or the press. Under this instruction, as long as the jury believed that Mrs. Lukis's "official duties" included dealing with reporters, as the prosecution had argued, the jury was free to convict Mrs. Lukis if it concluded that, as part of her relationship with Mr. Lukis, she accepted gifts, or even affection, knowing that she would deny the relationship if asked by a reporter -- something she herself admitted on the stand. The jury need never have found the "cash-for-influence" scheme it rejected everywhere else and which was the only lawful predicate for a guilty verdict.[3]

This is obviously not, as respondent suggests, an issue of mere wording.[4] See Resp. Br. 10. It is instead an issue concerning the substantive legal adequacy of jury instructions, an issue that is reviewable de novo and fully worthy of this Court's attention. See, *e.g.*, *United States* v. *Grigsby*, 111 F.3d 806, 814 (11th Cir. 1997) (reversal required when court "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations") (internal quotation marks omitted); *United States* v. *Anderton*, 629 F.2d 1044,

---

[3] Apparently realizing the inadequacy of this sentence, respondent proffers another, which it never cited or relied upon below, stating that if "'the acts described here during the course of the trial were made as part of th[e Lukises'] ongoing romantic relationship,'" that "'would constitute a complete defense.'" Resp. Br. 11 (quoting 4/15/97 Tr. 2176). This sentence was not part of instructions on Count One describing what the jury had to find in order to return a conviction on that count. It was instead part of the prefatory instruction on the general burden of proof. As such, it is entitled to little or no weight in the instructional analysis and cannot compensate for the defective explanation of the elements of the offense in "the court's definition of the crime itself." *United States* v. *Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994).

[4] Defense counsel expressly advised the district court that it did not "have to . . . use our language, although we think it's well supported in the cases," merely requesting that "somewhere we would like your Honor to instruct the jury what a scheme to defraud of honest services means exactly." Pet. App. 33a.

1049 (5th Cir. 1980) ("[w]hen the instruction uses a term of legal significance, its meaning must be explained, especially when there is a request for clarifying instructions"). Instructions cannot support a guilty verdict if they fail adequately to inform the jury of the salient legal principles necessary to decide the case properly, or to negate legally erroneous theories of liability that the evidence might otherwise suggest. See, *e.g.*, *United States* v. *Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994); *United States* v. *Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986).

That is precisely what happened here. Count One, like all the other counts of the indictment, was a bribery count. As the Eleventh Circuit had itself said in a pretrial appeal, Mrs. Lukis committed the crime charged in Count One only if she accepted money from Mr. Lukis "in exchange for her efforts to secure Board action that favored the interests of Lukis' clients." *United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1170 (11th Cir. 1997). Yet the instructions failed to inform the jury of that crucial fact. If, as other circuits have recognized, "honest services" is a term that needs to be defined, see Pet. 16-19, no fair reading of the Count One instructions can yield the conclusion that this specialized and abstruse legal concept was adequately explained here. Thus, the petition squarely presents the question whether, in an honest services mail fraud prosecution of a public official, the jury must be instructed on the meaning of the public official's "honest services in her official capacity."[5]

---

[5] Respondent attempts to draw an artificial distinction between the definition of "honest services" and the definition of "official capacity." Resp. Br. 10-11. The two terms are not separable; "official capacity" is simply part of the concept of "honest services" in a public corruption case. Together they define the scope of what 18 U.S.C. § 1346 prohibits a public official from trading away. In any event, respondent's suggestion that "official capacity," which it appears to concede was not adequately defined, is not a specialized legal term

(continued...)

II. NEITHER THE GOVERNMENT'S BRIEF NOR THE ELEVENTH CIRCUIT'S UNPUBLISHED PER CURIAM AFFIRMANCE INSULATES THE IMPORTANT INSTRUCTIONAL CONFLICT IN THE LOWER COURTS FROM REVIEW.

As the petition notes, there is a clear conflict in instructional practice among the circuits, with at least the First, Seventh, and District of Columbia circuits regularly providing the precise sort of definition of "honest services" the Eleventh Circuit declined to mandate here. Pet. 16-19. Respondent does not dispute the existence of this conflict; in fact, it affirmatively acknowledges it. Resp. Br. 12. Respondent merely attempts to minimize the significance of this conflict by making a variety of arguments which together amount to the observation that the conflict is not patent on the face of the court of appeals opinions from these circuits. *Id.* at 11-14.

That is not a sufficient reason to deny certiorari. Instructional defects, particularly in white collar criminal cases, often fail to ripen into appellate conflicts because acquittals preclude appellate review; the government only infrequently cross-appeals in cases it has won; relatively few prosecutions are brought annually, and even fewer are tried to verdict; and most district courts either get such issues approximately right, or their errors are harmless in light of the evidence. That is presumably one (but not the only) reason that this Court has typically required less in the way of an appellate conflict before granting certiorari on issues of substantive federal criminal law. Pet. 20-21.

---

[5] (...continued)
but is instead a common lay term analogous to "distribute" or "manager" is ridiculous on its face. Resp. Br. 10-11 (citing *United States* v. *Lignarolo*, 770 F.2d 971, 980 (11th Cir. 1985) ("distribute"); *United States* v. *Marino*, 639 F.2d 882, 888 (2d Cir. 1981) ("manager")).

But while conflicts of this type may not involve clashes of explicit appellate reasoning, they can be, as this one is, deep and real.[6] They can also be extremely important. This conflict, for example, portends disparate treatment in an area -- criminal prosecutions for public corruption -- that not only has a direct impact on the personal liberty of otherwise notably productive members of the community but also tends to impact the political system and attract a high degree of public interest.

Respondent's treatment of the First Circuit's ruling in *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996), is instructive in this regard. Respondent argues that *Sawyer* did not hold that an instruction defining "honest services" is required in every case. True enough. But *Sawyer* noted explicitly, in words that could have been written for this case, that "where . . . the line between the merely unattractive and actually criminal conduct is blurred" in honest services fraud prosecutions, "the court must take pains to explain the difference to the jury." *Id.* at 741. In the wake of that decision, the First Circuit adopted a pattern jury instruction requiring "honest services" to be defined and directing district courts in the circuit to look to *Sawyer* for the appropriate explanation of the concept. See *First Circuit Pattern Jury Instructions (Criminal Cases)*, Inst. 4.12 cmt (3) (1998). That is what district courts in the First Circuit have subsequently done, and the resulting instructions have made precisely the distinction that the instructions approved in this case by the Eleventh Circuit failed to. Pet. 17-18.

---

[6] The question is not whether the other courts "would regard the instructions given here as legally inadequate." Resp. Br. 12. The question is whether the instructions required and given in those other circuits adequately explain what these instructions left out, and thereby make clear the line between criminality and innocent conduct that would have allowed Mrs. Lukis's jury to render an accurate finding of guilt. They clearly do. Pet. 16-19; Pet. App. 79a-97a.

It is of no moment that the government below did not attempt to defend the proposition that Mrs. Lukis could be convicted for lying to the press about her love life, or that the Eleventh Circuit disclaimed that as its holding. Resp. Br. 13-14. That proposition was the unavoidable implication of the instructions that were given to Mrs. Lukis's jury and of the court of appeals' decision to affirm those instructions. Both the government and the court of appeals knew it. Their appellate sleight-of-hand should not be allowed to blind this Court to the realities of this case and defeat review.

* * * *

The jury instructions upheld by the Eleventh Circuit did not define Mrs. Lukis's "honest services in her official capacity" and left the jury ignorant of the critical distinction between mere dishonesty by a public official and criminal mail fraud. In so doing, the decision below conflicted with the standard practice in other circuits and resulted in the erroneous conviction of an innocent woman. As the Seventh Circuit has written, "[I]f 'not every breach' is criminal fraud, where is the line drawn? Its location cannot be found by parsing § 1341 or § 1346, a profound difficulty in a criminal prosecution." *United States* v. *Bloom*, 149 F.3d 649, 654 (7th Cir. 1998). Review by this Court is necessary to decide whether a public official can be convicted of "honest services" fraud for dishonest press statements and, if not, to make clear that jury instructions in such cases must define for the jury what "honest services" the criminal law obliges a public official to provide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carter G. Phillips*
Thomas C. Green
Bradford A. Berenson
Griffith L. Green
Andrew E. Weis
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

October 13, 1999